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ANNOTATION:

IT IS IN MATTERS OF SEX THAT CRIMINAL LAW HAS MADE ITS BOLDEST EFFORTS TO LEGISLATE MORALS.

ABSTRACT:

THERE IS NO JUSTIFICATION FOR MAKING SEXUAL CONDUCT BETWEEN ADULTS, BOTH CONSENTING, CARRIED ON IN PRIVATE, CRIMINAL. AS FOR PORNOGRAPHY, THERE SHOULD BE PROHIBITION OF - (1) SALE OR DISPLAY TO MINORS, (2) PUBLIC DISPLAY OR EXHIBITION WHEREBY THE PORNOGRAPHY IS CALLED TO THE ATTENTION OF THE GENERAL PUBLIC, OR THE PASSERBY, AND (3) COMMERCIAL ADVERTISING OR SOLICITATION THAT IS OFFENSIVE, VULGAR, LEWD OR OBSCENE. GAMBLING IS AN ACTIVITY OF HUMANS THAT OCCURS ON TWO LEVELS. ONE IS TYPIFIED BY SKY MASTERSON IN GUYS AND DOLLS, BETTING ON WHICH OF TWO RAINDROPS ON A WINDOW PANE WILL REACH THE BOTTOM FIRST, TWO GUYS GETTING PLEASURE OR EXCITEMENT OUT OF CHANCE. THE OTHER CONSISTS OF COMMERCIALIZED OPERATIONS, IN WHICH HARD-EYED MEN ORGANIZE MACHINERY TO PROFIT FROM THE FRAILTY OF HUMANS. THE FIRST SEEMS AS OLD AS MANKIND AND IS DOUBTLESS INCURABLE. THE SECOND IS AS OLD AS THE RAPACITY OF SOME MEN TO PROFIT FROM THE WEAKNESS OF OTHERS. IF CRIME IS INVOLVED IN THE FIRST, IT IS NON- VICTIM CRIME. BUT CRIME IN THE SECOND IS NOT NON-VICTIM CRIME FOR IT DOES INVOLVE INJURY TO SOCIETY.

THE SAN FRANCISCO COMMITTEE ON CRIME

A REPORT ON NON-VICTIM CRIME IN SAN FRANCISCO

PART II

SEXUAL CONDUCT

GAMBLING

PORNOGRAPHY

Moses Lasky, Co-Chairman
William H. Orrick, Jr., Co-Chairman
Irving F. Reichert, Jr., Executive Director
Richard M. Sims, III, Asst. Exec. Director

THE SEVENTH REPORT OF THE COMMITTEE

June 3, 1971

This Report is being submitted to the Law Enforcement Assistance Administration of the United States Department of Justice in partial satisfaction of the conditions of O.L.E.A. Grant #374.

THE SAN FRANCISCO COMMITTEE ON CRIME

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EXECUTIVE DIRECTOR

June 3, 1971

Honorable Joseph L. Alioto,
Mayor of the City and County
of San Francisco
City Hall
San Francisco, California 94102

My dear Mr. Mayor:

On April 26, 1971, the San Francisco Committee on Crime submitted to you Part I of its Report on Non-Victim Crime. We now submit to you Part II, which discusses gambling, sexual conduct (including homosexuality and prostitution), and pornography.

These are all manifestations of the human species that have been with mankind from time immemorial. Nothing ever done about them has been completely satisfactory, and doubtless nothing ever devised in the future will be so either. We think, however, that our recommendations are a step forward, promise improvement, and merit adoption.

If time permits before the Committee's existence ceases on June 30, 1971, there may be a Part III to the Non-Victim Crime Report.

Respectfully,

Moses Lasky

William H. Orrick, Jr.

Co-Chairmen

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June 3, 1971

Honorable Dianne Feinstein,
President of the Board of Supervisors
of the City and County of San Francisco
City Hall
San Francisco, California 94102

Dear Mrs. Feinstein:

The San Francisco Committee on Crime submits to you with this letter Part II of its report on non-victim crime. Sufficient copies are enclosed for all members of the Board of Supervisors. We also enclose a copy of the letter by which we are concurrently submitting the report to the Mayor.

Respectfully,

Moses Lasky

William H. Orrick, Jr.

Co-Chairmen

ML/nh
Enclosures

I. INTRODUCTION

This is the second in a series of reports by the Committee on so-called "non-victim crime" in San Francisco. In Part I of our Report on this subject, issued April 26, 1971,[1] we said that the term "non-victim crime" is a "loose term," useful only to suggest an area of inquiry. With this Report, we define our concerns with more precision, by examining the enforcement of laws dealing with sexual conduct, gambling and pornography.

Our task is to inquire whether we, the public, are not asking the system of criminal law and justice to do too much. We have found that, during 1969, the police were unable to solve more than 13% of the killings, forcible rapes, robberies, aggravated assaults, burglaries, larcenies, and auto thefts reported in San Francisco. During the same year, over 50% of all arrests in the city were for non-victim offenses.

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[1] San Francisco Committee on Crime, A Report on Non-Victim Crime in San Francisco, Part I. Copies of this report are available at the Committee's offices, 300 Montgomery St., Suite 709.

Thus, if we really want to cut down serious crime in San Francisco, either we must be willing to devote considerably more money to the criminal justice system -- to police, prosecutors, judges, public defenders, probation services, jails and prisons -- or we must re-examine our priorities in law enforcement. This latter task requires that we take a new look at old laws. In doing so, we are guided by a number of "basic principles." Our reasons for arriving at these principles were set out in some detail in Part I of this Report, and it would be cumbersome to repeat our arguments here. However, we list our principles again, with the hope that readers interested in the origins of these guidelines will return to Part I of this Report. Our principles are:

1. The law cannot successfully make criminal what the public does not want made criminal.

2. Not all the ills or aberrancies of society are the concern of the government. Government is not the only human institution to handle the problems, hopes, fears or ambitions of people.

3. Every person should be left free of the coercion of criminal law unless his conduct impinges on others and injures others, or if it damages society.

4. When government acts, it is not inevitably necessary that it do so by means of criminal processes.

5. Society has an obligation to protect the young.

6. Criminal law cannot lag far behind a strong sense of public outrage.

7. Even where conduct may properly be condemned as criminal under the first six principles, it may be that the energies and resources of criminal law enforcement are better spent by concentrating on more serious things. This is a matter of priorities.

II. SEXUAL CONDUCT

It is in matters of sex that criminal law has made its baldest efforts to legislate morals. And it is in these matters that its efforts are little defensible under the basic principles stated in Chapter I. There is no justification for making criminal sexual conduct between adults, both consenting, carried on in private, whether the participating adults be of one sex or two, both male, both female, or one male and one female. This is so obvious as respects adult non-commercial male and female relations that laws against fornication and adultery are rarely enforced. The lack of justification exists, moreover, in areas of sexual conduct, where shreds and tatters of "public outrage" linger on from an earlier age.

A. Homosexuality

In California homosexuals can be arrested for violating any one or a combination of sections of the Penal Code. There are four types of misdemeanor disorderly conduct: Section 647a, engaging in a lewd act in a public place or soliciting anyone to engage in a lewd act; Section 647b, engaging in prostitution where lewd acts are solicited for money or services; Section 647d, loitering about a toilet for purposes of engaging in a lewd act; and Section 647c, wilfully and maliciously obstructing a public way. Section 650 ½ makes it illegal to impersonate one of the opposite sex for purposes of committing a lewd act.

Section 286 makes sodomy, even between husband and wife, a felony, and Section 288a makes the act of oral copulation a felony.

Unlike drunkenness, homosexuality does not consume a large portion of San Francisco's budget for criminal justice. Although any deflection of the energies of law enforcement from controlling violent crime to matters of morals is a waste of limited resources, the case for change of the law relative to homosexuality is not one of dollars and cents.

The police of San Francisco are generally confining their efforts in the area of homosexuality to controlling street solicitation and lewd acts in public. There has been a tacit, if grudging, acceptance of the principle the Committee presents in this Report -- that the criminal justice system should not intervene in matters of purely private sexual conduct. This enlightened attitude has not always prevailed in San Francisco. Police and homosexuals concur that the turning point was a raid in 1965 on a "gay" dance, a raid to which there was a strong adverse community reaction. The desire for a more lenient attitude was communicated to the working policeman by the higher authorities in the police department. The new attitude may be based, in part, upon the fact that there are, perhaps, 90,000 homosexuals in San Francisco. At anything close to that figure, they constitute a substantial proportion of the population, and an even larger percentage of potential voters. Candidates for supervisor in the last election recognized this fact and addressed meetings of homophile organizations.

Thus, since 1965, the police have concentrated on the enforcement of law against public homosexual activity, usually involving some form of solicitation. For example, during 1969 the police arrested and charged 286 males with soliciting and engaging in an act of prostitution.[1] During the same year, the police made 57 male arrests for impersonating a female for a lewd purpose, and an unknown number of these were also charged with prostitution (therefore included in the above 286 arrested males). Forty-three (43) males were charged with committing lewd or indecent acts in a public place. During the same time, only eight (8) defendants (6 males and 2 females) were charged with sex perversion, while two (2) males were charged with sodomy. These charges of homosexual offenses accounted for a miniscule portion of the costs of criminal justice in the city during 1969. Indeed, arrests for all sex offenses (excluding prostitution and rape) accounted for less than 1/2 of one percent of all arrests during 1969.[2] The same pattern holds true for the state generally. Arrests for all sex crimes except rape accounted for less than two percent (2%) of felony arrests in the state during 1969.[3]

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[1] S.F.P.D., Annual Report, 1969, pp. 108, 130.

[2] Id. at p. 48. There were 282 persons arrested for sex offenses (excluding rape and prostitution) out of a total of 59,104 persons arrested during 1969.

[3] 3,352 arrests for sex offenses out of 198,157 felony arrests. California Bureau of Criminal Statistics, Reference Tables: Crimes and Arrests, 1969, p. 5.

Further relaxation of law or law enforcement against homosexuality is therfore not a matter of saving resources. It is based on the sound principles stated in Chapter I.

Other police departments in the Bay Area do actively employ police officers as "decoys" in public restrooms, bars and other homosexual hangouts. But the San Francisco Police Department has not been using this degrading procedure in recent years. By and large, the San Francisco Police Department now leaves "gay" bars and clubs alone. An active homosexual social life goes on in these places, but, as the police concede, there is little overt sexual activity.

Arrests for male prostitution routinely occur through the use of two procedures. Most often, a pair of uniformed or plainclothes patrolmen observe a female impersonator make contact with a potential customer. When it appears that "she" and the man are going to do business, the officers approach the couple, identify themselves and attempt to learn the details of the contact. One officer questions the "victim" trying to determine who initiated the conversation, what was said, the price agreed upon, and whether the "victim" believed the impersonator was female. (Invariably, the "victim" insists that he did.) The impersonator is then arrested, and the "victim" is released. Once released, he is very hard to find. The result here, as with female prostitution, is that many of the cases based on such arrests are dismissed for lack of evidence.

The second method of arrest parallels that employed to arrest females on prostitution charges;[4] an officer walks through an area frequented by prostitutes and waits to be solicited. If he is solicited, and a deal is made between him and the prostitute, an arrest results.

The plea-bargaining process described at length in earlier reports of the Crime Committee is used extensively in prostitution cases. One reason is that the arrests made on "observation" of a solicitation are difficult cases to try since the potential customer is hard to find when needed as a witness. Another reason is that judges are reluctant to send homosexuals to jail. There is a wide belief among the judges that jailing encourages homosexual activity. In this setting, the District Attorney usually drops one of the two charges[5] with the promise that a guilty plea on the other will bring no jail sentence. The court normally honors this bargain, except where there has been violence in the offense or the defendant has been before the court on other occasions.

To the extent that all this activity of police, prosecutors, and courts relates to <u>public</u> activity, there is a legitimate place for

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[4] To be described in the next Chapter of this Report.

[5] See above, p. 6. The combination charge Section 647b and 650 ½ -- male prostitution/female impersonation -- is the most frequently filed charge.

the criminal law. Society also has legitimate concern to protect the young. Penal Code Section 272 (contributing to the delinquency of a minor) and Section 288 (lewd and lascivious acts upon children) should continue to prohibit adults from engaging in sexual conduct with minors.

But beyond this the criminal law ought not to go.

Much of the teaching about homosexuality in Western societies stems from religious doctrine binding sexual relationships to procreation. Translated into legal phraseology, these teachings made homosexuality a "crime against nature," since the homosexual relationship produced no offspring. Homosexuality may continue to be instinctively repugnant to most people and it is not the purpose of this Report to argue away that repugnance or even to try to do so. This Report advocates nothing whatever on whether social, moral, or religious stigma should remain or be removed from homosexuality. It confines itself to the question of the proper use of criminal law, and the conclusion it has reached is the same as the Wolfenden Report in England,[6] the Report of the Task Force on Homosexuality of the National Institute of

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[6] Report of the Departmental Committee on Homosexual Offenses and Prostitution, Great Britain, <u>The Wolfenden Report</u>, (Stein & Day Pub. 1963).

Mental Health,[7] and the Report of the Roman Catholic Advisory Committee on Homosexual Offenses.[8]

Before leaving the subject, we must ask whether any facts are present which support continued criminalization of private, consensual homosexual conduct among adults upon the principles of Chapter I. Some members of the police department say that there are. They urge that there is a connection between homosexuality and violent crime. They claim that the number of homicides by one homosexual partner of the other is increasing. This may be true, for homicide is largely a crime of passion, occurring mostly among intimates and acquaintances. For example, the National Commission on the Causes and Prevention of Violence discovered that homicides and assaults occurred between relatives, friends, or acquaintances in about 3/4 of all reported cases.[9] These crimes may occur in homosexual relationships as well as in relationships between fathers and sons, wives and husbands, or boy-friends and girlfriends. But there is no evidence showing that assaults and homicides occur at a higher rate in homosexual relationships.

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[7] National Institute of Mental Health, Report of the Task Force on Homosexuality, (1969).

[8] Report of the Roman Catholic Advisory Committee on Homosexual Offenses, in Dublin Review, Vol. CCXXX (Summer 1956) p. 57 et seq.

[9] National Commission on the Causes and Prevention of Violence, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY, Award Books (1969), p. 27.

It has also been argued that prohibition of homosexuality is a measure to control venereal disease. Prevention of venereal disease is a legitimate matter of public concern, but nothing in present criminal law or enforcement policy holds any potential for mitigating venereal disease in male prostitution.

Other arguments against revising the laws to decriminalize private homosexual conduct were considered and found wanting by the Wolfenden Committee, with which we agree. We quote from that Report in Appendix A.

Frequently the argument about homosexuality and the law becomes entangled with the findings of Kinsey and others. Some argue that homosexuality is a sickness, others that it is merely the individual's location on a scale from total heterosexuality to total homosexuality; that there are far more covert than overt homosexuals, and that homosexuality cuts widely across the population. Arguments like these seek to remove the stigma from homosexuality, just as assertions about sinfulness seek to impose it. These arguments, at both ends of the stigma spectrum, miss the point. For the present purpose, it is enough that private consensual conduct of adult homosexuals (whoever and for whatever causes) threatens no harm to society at large so as to justify the use of the criminal sanction.[10]

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[10] See generally: Comment, Sexual Freedom for Consenting Adults--Why Not?, 2 Pac. L. J. 206 (1971).

B. "Unlawful Sexual Intercourse" (Statutory Rape)

Rape by force or fraud are not "non-victim crime" and are outside the scope of this Report. But Penal Code Section 261.5 makes it criminal for a male to have sexual relations with a female under the age of 18 however much she consented or was even the aggressor, or even when the male is a minor.[11]

We can find no justification at all for this kind of law to apply when both participants are minors. When one of the participants is a minor (under 18), and the other an adult, the same law should apply to the adult, whether the adult be male or female.[12] And if the minor be close to the age of majority and the adult only a little older, the concern of the law to protect minors from adults does not fit the situation either. "Statutory rape" is a ripe implement for shakedowns. It is so susceptible of creating injustice that the Supreme Court of California 7 years ago created an escape hatch by holding that the male could not be held guilty if he "reasonably"

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[11]The crime is "Unlawful Sexual Intercourse." Punishment for conviction, as set out in Penal Code Section 264, can be by commitment to either county jail or state prison, in the discretion of the jury or the judge where a guilty plea is entered.

[12]Females may now be convicted for Contributing to the Delinquency of a Minor. See Penal Code Section 272, People v. Aadland, 193 C.A. 2d 584, 14 Cal. Rptr. 462 (1961).

supposed the female to be of age.[13] A female of age 18 is probably as adult sexually as a male of 21 or 22. It has been suggested that the adult not be guilty of statutory rape unless the adult is at least three years older.[14] We agree with that view.

C. Prostitution

Prostitution is essentially a business transaction between a willing buyer and a willing seller. As long as there is a demand for prostitutes, they will exist. Prostitution has been made criminal because of a wide and historical feeling that it is immoral and sinful. And that is no proper basis for invoking criminal law. So far as prostitution consists of sexual conduct in private between two willing adults, the principles for removing the illegalization apply as much as they do to homosexuality, even more so as the moral repugnance to most people is less. Justification for using criminal law must look further, and this Report will examine the justifications advanced. But first we turn to the costs and show the futilities of trying to enforce our present laws on the subject.

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[13]People v. Hernandez, 71 C. 2d 529, 39 Cal. Rptr. 361, 393 P. 2d 673 (1964).

[14]California Joint Legislative Committee for Revision of the Penal Code, Tent. Draft No. 1, (Sept. 1967), p. 63.

Clamor and Law Enforcement

Law enforcement policy nowhere appears more susceptible to political pressure and whim than in the area of prostitution. Arrest figures jump one year and plummet the next.[15] Rousting prostitutes has long been the most flamboyant of police "streetcleaning" operations. There is no arrest pattern more ritualized and superficial, nor any more apparently ineffectual. On a given night, police may bear off to the Hall of Justice as many as sixty girls, most of whom are back on the street the next night. In an election year political pressures drive the whole operation into high gear: "Wait and see," said one cynical member of the Black community, "the closer to November, the harder the police and politicians will stress cleaning up on the streets." Newspapers and political candidates have focused attention on the problem in the last couple of years,[16] and police have responded to pressure to clean up the street by making more arrests for prostitution (see Chart A, p. 15).

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[15] Chart A, showing the number of prostitution arrests for the years 1936-1969 also reflects historical developments and events in San Francisco which had an effect upon the number of prostitutes presumably present in the city. But in some of the years ('48-'52), ('60-'65), and ('65-'66) the fluctuations are far too great to be explainable on the basis of a proportionate reduction in the number of prostitutes "working" in the city.

[16] Numerous studies and exposes have been produced in the past two years on prostitution. Particularly in August, September, November and December 1968 when a new Vice Detail head was appointed.

CHART A

PROSTITUTION ARRESTS, SAN FRANCISCO
1936 - 1969

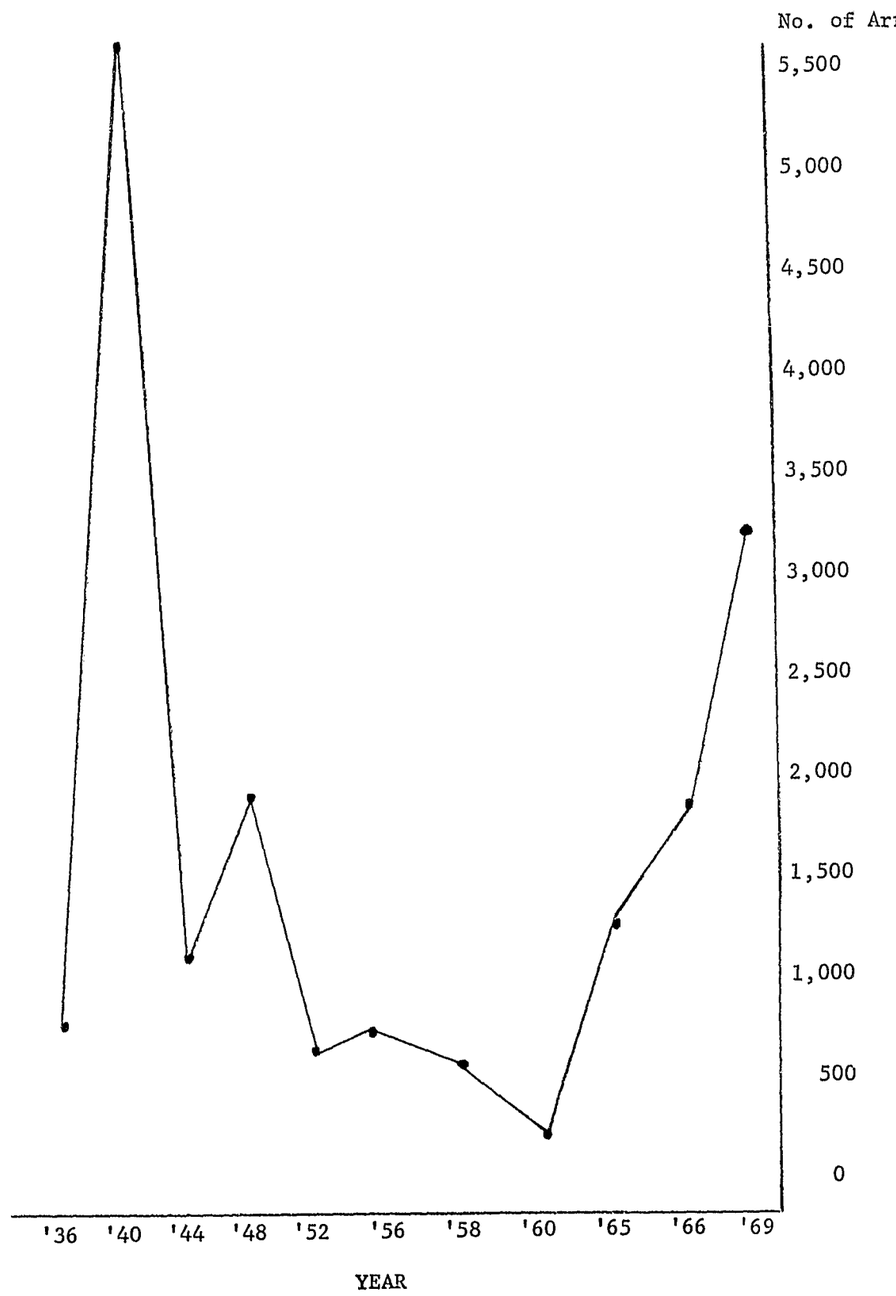

Table I, on page 17 shows that ten times as many girls went to jail in San Francisco in 1967 than in other comparable jurisdictions. Yet police admit that prostitution, particularly streetwalking, is on the increase.

Less than ten years ago police made only 330 arrests in the city for prostitution (Chart A). During 1969, the figure had risen to 3,221.[17] It does not follow, however, that there are ten times as many prostitutes now as there were then. Prostitution arrest figures for any period may reflect political pressure and fail to be any index of the prostitute population at any given time.

No person conversant with reality believes that prostitution can be "eliminated," certainly not in a city like San Francisco -- with its port, tourists, conventions, etc. It is no doubt true that some American cities have controlled visible streetwalking prostitutes by the application of criminal sanctions, and the Crime Committee believes that to be a legitimate use of criminal law. But the prostitution continues clandestinely.[18]

In the late 30's through 1950, more than 130 houses of prostitution were closed down in a clean-up campaign inspired by the State Attorney General's Report (The Atherton Report) on vice in San

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[17] S.F.P.D., Annual Report, 1969, p. 150.

[18] See George, Legal, Medical and Psychiatric Considerations in the Control of Prostitution, 60 Mich. L. Rev. 717 (1962).

TABLE I

DISPOSITION OF PROSTITUTION ARRESTS*
SELECTED CITIES, 1967

	ARRESTED	CHARGED	DISMISSED	JAIL	SUSP. SENT.	FINE	OTHER	PENDING
SAN FRANCISCO	2,116	1,335	621	389	249	84	12	400
BOSTON	502	502	39	1	0	288	0	174
WASH., D.C.	225	225	58	39	0	0	43	85
ST. LOUIS**	2,046						176	

*Sources: San Francisco Police Department, Annual Report, 1967, pp. 124-168; San Francisco Municipal Court Docket, Vols. 130-132 (A-Z); Boston Police Department, unpublished figures, Records and Planning Unit, 1967; Washington, D.C. Police Department, unpublished figures, Research and Planning Unit, 1967; St. Louis Police Department, unpublished figures, Research and Planning Unit, 1967.

**St. Louis reports only 176 individuals arrested were guilty of charge.

Francisco. Before then police were heavily involved in pay-offs, and prostitution flourished under their protection. When the city became a port of embarcation before the war, girls came here from other cities to practice their trade. Venereal disease became a serious social problem, and police made over 5,600 arrests in 1940 in an attempt to check it.

After the war and through the 50's prostitution arrests dropped off in the absence of any serious public concern over the issue. Streetwalkers were discreet and generally cautious.

In the late 60's, as street violence rose, politicians and police pledged efforts to control it. Since prostitution is a highly visible kind of street "crime" police concentrated manpower on making those arrests, in an effort to satisfy the more general public demand that they "do something about crime."

Most of those who seek prostitutes in San Francisco are returning servicemen or merchant seamen, conventioneers and other visitors looking for the "fun" San Francisco has a reputation for providing. The middle class tourist works through a cab driver, hotel clerk or bellhop who will put him in touch with the $100-a-night call girl. She is generally not a native of San Francisco, and she does not stay long enough to get caught; she is shrewd, versatile, and usually white. Affluent "swingers" may also find sexual partners at some massage parlors and "breakfast clubs," the latter a euphemism for sleasy early-

morning catch-alls of vice-prone buyers. Less affluent visitors pick up bar girls or streetwalkers, the latter considered by other prostitutes to be of the lowest caste.

The range of prostitution in this city is fantastic. Practitioners may be male or female; black, white, or oriental. They may be 14-year olds hustling as part of a junior high school "syndicate" operation; they may be hippies supporting the habits of their "old man" (or their own habits); they may be moonlighting secretaries who sell their favors on a selective basis through legitimate dating services. Places of assignation range from run-down hotels to luxurious hilltop apartments. A few "houses" still exist (under elaborate covers) in spite of the red-light abatement laws.

Streetwalkers -- because they are so flagrantly visible -- have provided the greatest source of public outcry and consequent political pressure. As competition increases, there is strong rivalry for "territory" and approaches to the customer become more aggressive. Hotel owners in the downtown area complain that respectable tourists are shocked by the aggressive tactics of streetwalkers in the heart of town.

The Cost and Futility of Enforcement

Based on their investigations,[19] members of the Committee's staff

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[19] Summaries of the staff analysis appear in Appendix B.

concluded that it cost the city more than $270,000 to arrest, process, and prosecute 2,116 prostitution arrests to the point of sentencing during 1967, plus probable county jail costs in excess of $100,000 for those convicted of a prostitution offense. The total: more than $375,000, or an estimated per arrest cost in excess of $175. These costs were undoubtedly even higher during 1969.[20]

What do San Francisco taxpayers buy for $175 every time a prostitute is swept up off the street? They buy essentially nothing of a positive nature, and agreat deal that is negative. Without really affecting the problems associated with prostitution, they are supporting a futile operation and one of the most cynical conducted by any level of government.

During 1969 the police arrested 1,566 adults (including 286 males) for either soliciting or engaging in an act of prostitution. In 683 cases the charges were dismissed. In 706 cases charges were still "pending" at the end of the year. During the year only 246 defendants went to jail for soliciting or engaging in an act of prostitution, and most of them were sentenced to less than four months. Another 1,938 adults were arrested for "obstructing the sidewalk," the usual charge in a street-sweep operation where no attempt is made to prove solicitation. 198 of these were dismissed, 983 defendants

[20]The San Francisco Police Department reported 3,221 prostitution arrests during 1969. S.F.P.D. Annual Report, 1969, p. 44. In addition the 1967 cost figures were calculated according to costs for that year.

received suspended sentences, and 599 cases were pending at the end of the year. Only 334 went to jail, usually for less than thirty days.[21] Assuming that most arrests for "obstructing the sidewalk" are substitutes for prostitution arrests, we can conclude that, during 1969, only about 15% of all persons arrested on prostitution charges in San Francisco ended up going to jail, almost invariably for a period of time between one and four months. The police say that even prostitutes who are sent to jail are not deterred from future prostitution; they write off a short jail sentence as the cost of doing business.

The reason that current enforcement practices have not worked is that the statutes are unenforceable and the courts congested. The appearance of efforts at enforcement goes on because it offers the public the appearance of "controlling" prostitution. The whole process resembles a game.

The game starts on the streest, where the police are supposed to arrest prostitutes for soliciting or for engaging in an act of prostitution. Yet the soliciting prostitute is a very difficult rabbit to catch. Any citizen can report a solicitation to the police. But

[21]For the foregoing figures see, San Francisco Police Department Annual Report, 1969, pp. 130, 150, 176, 178.

citizens are ordinarily not so offended that they are willing to call the police, fill out a report, and spend time on the witness stand in the Municipal Court. Customers do not wish to get involved with a prostitution arrest. When a police officer apprehends a prostitute and customer on the street, the customer is likely to give the officer a false name and address, thereby foreclosing attempts to locate him when the case comes up for trial. Even if the customer gives his correct name, the chances are slim that he will be willing to go to court. One Municipal Court judge in 1970 set all cases (where the customer was expected to testify) for trial on the same day, because he knew that only one in a hundred would ever go to trial and others would "fold up." This practice became widely known around the Hall of Justice as "trick day."

Since the police know that they cannot rely on a customer's testimony, they have turned to the use of plainclothes officers who pose as customers, walking through an area or sitting in a bar, waiting to be approached. He may or may not be "wired up" to record the conversation. But he must maneuver the girl to make the approach and set the price -- any overt move on his part would be considered entrapment. The girl, unless she is a novice, is likely to be wary of any man who seems to be playing coy; she knows he is probably a police officer. The kind of verbal skirmishing that occurs in this situation consumes much police time and often accomplishes little. Street grapevine is able to identify a plainclothes officer in almost no time.

The police themselves know that this sort of plainclothes stalking produces few arrests for the time and effort invested. Most often they settle for street-sweeps, with arrests for "wilfully and maliciously obstructing the sidewalk."[22] The sweep is merely a way of removing the girls from the street temporarily (until three or four o'clock the next afternoon), getting publicity, and swelling arrest statistics. Neither the district attorney's office nor the judges take this kind of arrest seriously unless there is a previous conviction of some kind. A girl who makes no fuss knows that she will soon be back at work. She is eligible for bail and has a right to an attorney. Her pimp will get her bailed out and will usually retain one of several lawyers who specialize in prostitution cases. Since a native-born prostitute (and particularly one with prior arrests) is a better-than-average risk to a bondsman, there is seldom any problem in getting a bond. The pimp, too, has an interest in having his girl make her court appearances, since he must maintain a good working relationship with the bondsmen in order to keep his girls on the street. Thus, within forty-eight hours of her arrest, the girl is back on the street, further indebted to her pimp.

The girl's case is now formally in the Municipal Court. Her lawyer demands a jury trial, knowing that it is impossible for the

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[22] Sec. 647c P.C.

courts to provide jury trials for even a fraction of those arrested for prostitution, let alone for the multitude of other misdemeanor offenses that the courts must process. The District Attorney reports that during 1968-69, 23% of all jury trial demands in Municipal Court were in prostitution cases.[23] Municipal Court judges who have presided over the criminal trial departments have estimated that 30-35% of all jury trial demands during 1970 were made in prostitution cases.

The girl's attorney knows that, if the case depends on the testimony of the customer, chances for a dismissal are excellent, even though the case may remain in court until the day of trial. If it appears that the case involves an irate customer who wants to testify, or that a plainclothes officer is a witness, the lawyer's tactic is to ask for repeated continuances of the case until the customer stops coming to court or until the prosecution offers a better plea bargain. The large number of continuances granted in prostitution cases is demonstrated by the fact that 706 of those cases were pending at the end of 1969. In one case one girl arrested four times within a two month period was given twenty-one continuances over the following 13 months! Continuances also give the lawyer and his client a chance to "judge shop" as the case is transferred from court to court until it finally reaches a judge known to "go easy" on prostitution offenses.

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[23] Office of the District Attorney for the City and County of San Francisco, Annual Report, 1968-1969, p. 8.

Judges say that if they did not grant continuances, lawyers would ask for a jury trial and the court calendars would become more hopelessly clogged than ever.

In consequence of all this, most prostitution cases are dismissed or short sentences are given on plea bargains. It is obvious that nothing is gained by the State Legislature's attempt in 1969 to make sentences in prostitution cases more severe by requiring a 45-day sentence for a convicted prostitute with one prior prostitution conviction and a 90-day sentence for a defendant with two or more priors.[24] The legislature may have thought that stiffer sentences would increase the "cost of doing business" and thereby discourage prostitution. But if mandatory penalties increase, there are more jury trial demands, more continuances, and, following conviction, more appeals. If the legislature had really wanted stiffer prostitution sentences, it would have had to provide the judicial resources -- from courts to prosecutors to bailiffs and clerks (not to mention jail facilities) -- to enable the whole system to handle a vastly increased load of contested cases.

The criminal process not only fails to be significant deterrent for prostitution, it does nothing to help the prostitute. It reinforces

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[24] Sec. 647b P.C., as amended.

the pimp's role in the prostitution complex. Nor does a jail sentence -- whether short or long -- help a girl who wants to get out of the business. She is not given protection from her pimp when she is released from jail. She has not been given any education or training or skills which might enable her to survive economically without prostitution, and if she has a drug habit when she goes into the county jail, she will have it when she gets out.

Studies have shown that most prostitutes do not like their work.[25] While there is much debate among medical authorities over the causes of prostitution, there is wide agreement that many, if not most, girls who become prostitutes are suffering from psychological illness of one kind or another.[26] It is not for us to determine which medical theory of prostitution is correct; it is enough that we recognize that prostitution is connected with psychiatric illness.

Thus there are a number of losers in the "prostitution game" as it is now played. The taxpayers are losers, because they do not get

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[25] See Khalaf, Prostitution in a Changing Society, Khayats Pub., Lebanon (1965), p. 81. Report of the Departmental Committee on Homosexual Offenses and Prostitution, Home Department, Great Britain, The Wolfenden Report, Stein & Day Pub. (1963).

[26] Thompson, Psychiatric Aspects of Prostitution Control, 101 Am. J. Psychiatry, 677 (1945), Agoston, Some Psychological Aspects of Prostitution: The Pseudo-Personality, 26 Int'l. J. of Psychoanalysis, 62 (1945), Wengraf, Fragment of an Analysis of a Prostitute, 5 J. Crim. Psychopath, 247 (1943), Lichtenstein, Identity and Sexuality, 9 J. Am. Psychoanalytic A. 179 (1961).

what they think their money pays for. The police and the courts are losers. But the pimps continue to exercise their dominion from the sidelines.

The Arguments Encountered for Continuing Present Law about Prostitution: Public Decency, Associated Crimes, Venereal Disease, Protection of Minors and Girls of Racial Minorities

The real root of laws criminalizing prostitution is moral repugnance,[27] but other considerations are advanced to support these laws. It is said that these laws and their enforcement (1) prevent offense to decency when prostitutes become a visible and public nuisance; (2) prevent robbery, extortion, sales of dangerous drugs, and the development of organized vice rings feeding on prostitution; (3) prevent the spread of venereal disease; and (4) prevent exploitation of juveniles and racial minorities. We must discuss these claims to see what merit they possess.

We think it clear that prostitution on the public streets in a highly visible form is no longer a "non-victim" crime. The offense to public decency and public sensibilities, the obstruction of

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[27] A medical historian has written that "It was the fear of venereal disease more than a change in the moral fabric of society which led to an increase of degrading punishments meted out to prostitutes * * *;" Bullough, The History of Prostitution, pp. 134-135 (University Books, 1964). But the root of making prostitution a crime is undoubtedly moral feeling of its sinfulness.

passageway, the irritation of the passerby, all constitute an offense to society which does warrant prohibition and the use of criminal process, if the use of that process can be successful. The tentative conclusion that would seem to follow is this: (1) Remove criminal prohibitions from prostitution carried on privately and discreetly off the street, but (2) continue the prohibition against streetwalking. We explore the question each raises to see whether the tentative conclusion is the correct one.

According to the Chief of Special Services of the police department, between 20-30 robberies are reported each week in connection with prostitution. During 1967, there were 596 robberies or thefts reported to the police in connection with prostitution, amounting to a loss of victims of over $145,000.[28] Though it cannot be measured, the police claim that the amount of theft associated with prostitution is many times that reported to the department.

No doubt, some prostitutes do rob or "roll" their clients by the use of force or the threat of force. (One pimp has told us that it is necessary to protect the girls from being robbed or beaten by the customer.) More frequently, however, prostitutes rely on their customer's naivete or stupidity. Bar girls, for example, may sit with a man until he has drunk enough to be insensible, and then slip

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[28]San Francisco Police Department Prostitution Theft Detail figures, 1967.

some money out of his wallet without ever engaging in an act of prostitution. Another frequent ploy is the "paddy hustle," where the customer leaves his wallet or other valuables with a friendly and trustworthy third party (who may or may not be a pimp), only to find his possessions gone when he returns.

Confidence games like these are as old as civilization. They will continue so long as there are "gulls" who will be "gulled." In prostitution there is a high degree of "assumption of the risk" on the part of the customer. Bearing in mind the financial limits on public resources available to combat crime, this is a poor area to apply "consumer protection" against the consumer's own gulibility. The answer to prostitution-connected force, violence or theft is that it is chargeable and punishable as a separate crime, independent of any act or solicitation of prostitution.

Moreover, it is more likely that a crime of force or violence, "connected with prostitution," will be committed by a male pimp than by a female prostitute. The commoner practice is for the prostitute to lure the customer to a hotel room, car, or apartment, where he becomes the easy target for strong-arm pimps. In short, society's effort to prevent crimes of violence associated with prostitution would be more effective by concentrating law enforcement efforts on the pimps, rather than on the girls, on the "associated crimes" rather than prostitution.

During 1967, the police arrested 140 "known prostitutes" for possession of narcotics and dangerous drugs,[29] a wholly insignificant part of the city's 4,278 total arrests for drugs and narcotics during the same year.[30] However, these bare statistics tell us little. Interviews have revealed a close connection between prostitution and drug abuse, but we must examine the connection closely, to see what it really signifies.

Pimps sometimes induce girls into taking habit-forming drugs, as a calculated way of gaining power and control. The girl performs for the pimp, who in turn supplied her with drugs for her habit. Moreover, many women and men become prostitutes because they are suffering from any one of a host of psychiatric illnesses, and it is likely that the psychiatric problems which lead persons to prostitution also lead those persons into the drug sub-culture.

While we cannot measure the relationship between drug sales and prostitution, we know that many pimps are also drug dealers. There is little evidence of independent drug-dealing by prostitutes themselves.

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[29] San Francisco Police Department Prostitution Theft Detail Records, 1967.

[30] San Francisco Police Department, Annual Report, 1967, p. 45.

Where prostitutes are selling drugs or narcotics, they are usually doing so because a pimp has given them no alternative.

In short, if we want to reduce the dissemination of dangerous drugs and narcotics associated with prostitution we should focus attention on the pimp, not the prostitute.

It is sometimes suggested that there may be a connection between prostitution and organized crime. The Committee on Crime is not a Grand Jury and has no power of subpoena. It has therefore been unable to investigate whether there is organized crime in San Francisco. We know, however, that the President's Crime Commission reported in 1967 that prostitution plays "...a small and declining role in organized crime's operations."[31] On the other hand, we have been informed by reliable law enforcement authorities that pimps are in control of virtually all street-walking prostitution in the city, and that the pimps themselves are organized. We presume that in the near future we will know much more about organized crime in the Bay Area, since a special task force of the United States Department of Justice, headquartered in San Francisco, is currently investigating that area.

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[31] President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 189 (1967).

No doubt organized crime could not gain a foothold in prostitution if there were no prostitution. It is also probable that if prostitution were not a crime, it would not be organized. In any event, a law enforcement policy of sweeping prostitutes off the streets and into our courts is no way to keep organized crime out of prostitution. The prostitute is the last link in any chain or "organization," whether the organization is limited to a pimp and his stable or whether it extends beyond. By and large, in this context, the prostitute is a victim -- obviously a victim of pimps, possibly of poverty and racism, and probably a victim of psychiatric abnormality.[32]

One of the most fearsome problems associated with prostitution is the spread of venereal disease. This has been true since at least the fifteenth century, when the "bad pox" appeared, apparently for the first time in Europe.

Medical studies show that a high percentage of prostitutes are carriers of venereal disease.[33] While Public Health officials agree

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[32] See p. 26, infra.

[33] Mc Ginnis & Packer, Prostitution Abatement in a V.D. Control Program, 27 J. Social Hygiene, 355, 357 (1941); Willcox, Prostitution and Venereal Disease, 13 Int'l. Rev. of Crim. Policy 67 (U.N. Pub. No. 58 IV. 4, 1958).

that changing sexual patterns among adolescents and young adults is the major cause of the increase in the disease among the young, there can be no doubt that prostitution, with its high commerce in partners, plays a significant role. No scheme of medical inspection can be effective in checking venereal disease among prostitutes.[34] Not only are female cultures simply not accurate tests of venereal disease, but a prostitute can acquire V.D. immediately after inspection and infect fifty to seventy men before she is inspected again. In any event, the present method of handling prostitution is ineffective to controlling V.D. When police make a large "sweep," the girls are ordinarily given a shot of penicillin and asked to return, but few do. Nor can they be located, since they give false addresses to the police. The very criminality of prostitution serves to discourage many girls from seeking cures. Since, we have concluded, prostitution cannot be stamped out by the increased use of law enforcement resources, the most effective remedies for the problem of venereal disease must be found in efforts that will (a) educate both prostitutes and customers to the risks and dangers of venereal disease; (b) encourage, rather than discourage, prostitutes in seeking medical inspection and help; and (c) encourage medical research to develop preventive medical approaches to venereal disease.

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[34] See: George, supra, note 4, at pp. 738-739.

There is still another factor to consider: the exploitation of minors and racial minorities. Young girls, particularly young Black girls, are being enticed into the profession by enterprising pimps. The police report that during 1969 about 60% of all women arrested for prostitution were Black, and the perecentage of Black women arrested for "obstructing the sidewalk" (a frequent street-sweeping charge) was even higher.[35] Over 20% of all women arrested for prostitution during the same year were between 18 and 20 years old,[36] and, in addition, 36 juveniles were taken to the Youth Guidance Center for "delinquency" associated with prostitution.[37] Prostitution rings have been uncovered in San Francisco high schools, and knowledgeable streetworkers in the Western Addition and Tenderloin swear that the police department's juvenile arrest figures vastly under-represent the proportion of young girls arrested for prostitution, because the girls lie about their age.

The pimp has a number of means of power and influence at his command. One, already discussed, is drugs. Another is his

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[35] San Francisco Police Department, Annual Report, 1969, p. 150.

[36] Id. at p. 128.

[37] Id. at p. 82.

affluence and glitter in the midst of poverty. No employment agency can match the offer that the pimp holds out to the poor, young, uneducated girl. Then too, the pimp offers many girls a promise of caring. Once a girl is in the pimp's stable, his tactics may change considerably. The girl discovers that her promised cut shrinks to only a modest share. And she discovers that it is, after all, a very tough game. The penalty for holding back on the pimp's cut is likely to be a beating or a cutting, and the same may be true if she wants to leave the stable. It is no accident that law enforcement officials have enormous problems in getting convictions for pimps. The girls are afraid they will be killed.

The pimps also have a large amount of economic leverage, and most of this is supplied by the criminal justice system itself. The pimp allows his girls enough money so that they can keep themselves looking good but not enough so that they can keep themselves out of jail. The girls need the pimp to pay bail and to hire a lawyer. Thus a direct consequence of our current law enforcement practices is that they provide the pimp with economic power over his girls.

There are stringent laws against the activities of pimps. Pimping, "pandering" and conspiring to commit prostitution are all felonies, punishable by from one to ten years in state prison.[38] But in 1969

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[38] See Secs. 182, 266h, 266i P.C.

the San Francisco police arrested only one adult for pimping, and the charges were dismissed.[39] In that year there were no arrests for pandering,[40] and only nine adults were arrested on criminal conspiracy charges,[41] an unknown number of these involving activities not connected with prostitution. Indeed, during 1969, only 25 defendants in the entire State of California were convicted of either pimping or pandering, and, of these, only four defendants were sentenced to state prison.[42]

In large part, the failure of law enforcement against the operations of pimps has been a failure of proof; girls won't talk. While the problems involved in prosecuting pimps are enormous, it seems to us that they are not insurmountable. Difficult problems of proof have existed wherever rackets have taken hold and have been broken. Law enforcement officials should ask for help from other jurisdictions in the state, and from the state itself, since pimps are an increasing problem in the state generally. This may mean, for example, that girls who are willing to testify may be sent to other jurisdictions and protected there by other law enforcement agencies. It may mean, too,

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[39] San Francisco Police Department, Annual Report, 1969, p. 176.

[40] Id.

[41] Id. at p. 170.

[42] California Department of Justice, Bureau of Criminal Statistics, Superior Court Prosecutions, 1969, Table 25, p. 33.

that there can be an exchange of ideas and techniques in law enforcement against pimps. San Francisco can ask for the cooperation of the federal government. For example, tax evasion has been used successfully as a tool in efforts to stamp out organized crime in other parts of the country, and we suspect that it would be a useful device for cleansing our city of pimps.

We believe, further, that removing the illegalization of private, non-visible prostitution would itself contribute to lessening the grip of the pimp, for it would open an area of activity to the girls where the pimp's protection would be less needed. Possibly the most important step to be taken in reaching the pimp is for the authorities to seek the help and cooperation of the minority communities. There is some sentiment in those communities that present enforcement practices against prostitutes are discriminatory and unfair, but there are also overwhelming distaste and revulsion for the pimps who prey upon those communities. Our own interviews and investigations have convinced us that there is substantial supply of information about the activities of pimps which could be tapped by law enforcement, if the minority communities could be convinced that the pimps -- and not the girls -- were the target of the criminal law and of enforcement policies.

One thing is clear. Present law enforcement practices have not worked, and we can do little worse by trying something different.

We are thus impelled to the conclusion that continued criminalization of private, non-visible prostitution cannot be warranted by fear of associated crime, drug abuse, venereal disease, or protection of minors. Our tentative conclusion to to this effect becomes fixed.

We turn back to the tentative conclusion that criminal law should continue to prohibit open solicitation on the streets.

Prevention of Open Solicitation

We have observed the aggressive tactics of large groups of prostitutes in the Western Addition and in the Tenderloin and have seen them flag down cars and grab at the coattails of pedestrians. There are undoubtedly many elderly persons and merchants in the Tenderloin, families in the Western Addition, and tourists in the North Beach area who feel offended, even imperilled, by the open solicitations that take place before their eyes. Few respectable citizens care to look upon the exposed face of vice, and they should not have to.

But it is argued that, since efforts to enforce the law against visible prostitution have been so costly and so futile as we have described, it makes no sense to continue the prohibition and the enforcement. It is argued, too, that strict enforcement of criminal sanctions against street solicitation make the pimp's role as a

procurer even more necessary, since streetwalking is currently the prostitute's way of advertising her wares. The arguments are persuasive, but not persuasive enough. If non-visible, private prostitution, conducted discreetly off-the-street, were no longer criminal, there would be a place for the girls to go, lawfully, and that very fact may join hands with continued enforcement of the law against street operations to diminish the street evil to an acceptable level. Yet if that hope proves wrong, and if the courts continue to be deluged with street prostitution cases, there are other measures that can be taken. The large number of jury trial demands in solicitation cases clog the courts. The Municipal Court judges can announce collectively that they will not impose more than a 15-day sentence on any defendant, charged with solicitation, who agrees to waive a jury trial and is tried by the court and found guilty. A similar promise of leniency by the courts -- say a promise to impose no more than 60 days upon conviction -- could be made in return for a defendant's willingness to be tried by a six-man jury.[43]

It is said that such a waiver of a right to jury trial is unconstitutional, because a defendant would face a longer possible sentence, if convicted, by insisting on a jury of twelve. Thus, it

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[43]Art. I, Sec. 7 of the California Constitution now permits misdemeanor cases to be tried with a jury of less than twelve, where both prosecution and defense stipulate to the smaller jury.

is argued that the courts cannot make it "costly" for a defendant to insist on his right to a full jury trial.[44] We, however, think that a voluntary and knowledgeable waiver of jury trial, in exchange for a promise of leniency by the courts if the defendant is convicted, is closely analagous to plea bargaining, where the defendant enters a plea of guilty based upon a promise of a reduced sentence by the courts. This process is clearly permissible if the plea is entered knowingly and voluntarily and if the state keeps its bargain with the defendant.[45]

If waivers of full juries in this fashion are declared unconstitutional, it may be necessary to amend the State Constitution to create a new class of "petty" misdemeanors, in which solicitation for prostitution would be included. These petty offenses might be tried without juries, so long as the defendant faced a minimal sentence.[46]

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[44] Cf. Spevack v. Klein, 385 U.S. 511 (1967), Garrity v. New Jersey, 385 U.S. 493 (1967).

[45] People v. West, 3 C. 3d 595 (1970), People v. Delles, 69 C. 2d 906 (1968).

[46] A defendant charged with a serious crime has a right to a trial by jury in state court under the Sixth Amendment to the Federal Constitution. Duncan v. New York, 391 U.S. 145 (1968). However, there is no Sixth Amendment right to a jury trial where the possible punishment does not exceed six months imprisonment. Baldwin v. New York, 399 U.S. 66 (1970), Cheff v. Schnackenberg, 384 U.S. 373 (1966), District of Columbia v. Clawans, 300 U.S. 617 (1937). We believe, however, that where a defendant has no right to jury trial, and is tried by a judge, his possible sentence upon conviction should not exceed 15 days.

We should at least experiment before entirely abandoning efforts to preserve public decency. The fact is that society has struggled with the problem of prostitution since time immemorial, and no solution has seemed to work satisfactorially.

The Final Conclusions and Recommendations

Any realistic appraisal must start with recognition of the fact that "the world's oldest profession" is going to be with us forever, and the real question is how the city should go about developing a means of dealing with prostitution that limits its visibility and keeps its associated problems to the barest possible minimum.

Any system of control of prostitution should attempt to:

(1) Prevent street solicitation;

(2) Eliminate the pimp or panderer;

(3) Prevent the enticement of minors into prostitution;

(4) Prevent the use of force or violence, or the sale of dangerous drugs in connection with prostitution;

(5) Provide education, treatment, or counseling for prostitutes who wish to leave the business;

(6) Retard as much as possible, the spread of venereal disease.[47]

We have been presented with forceful arguments that all these objectives can best be served by a system of licensing prostitution, by which government admits the necessary existence of prostitution and licenses its conduct. Forceful as these arguments are, we are unpersuaded by them. The history of prostitution is, in a sense, a history of pendulum swings between licensing and repression. The licensing of prostitutes in London was proposed as early as 1724, on grounds that it would cut down on many evils, including venereal disease. During the eighteenth and nineteenth centuries, prostitution was licensed in both Paris and Berlin. Attempts at regulation by licensing narrowly failed in the nineteenth century in New York, Chicago, Cincinnati and Washington, D.C. When these measures died, the police turned to informal "segregation" -- the toleration of known, but unlicensed, "red-light" districts where prostitutes were often required to register with the police, though no law required the practice.[48]

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[47] This objective comes last because in the present state of medical techniques no system of control, either within or without the criminal justice system, can have an appreciable effect on this problem.

[48] For the foregoing history, see BULLOUGH, supra, note 27, pp. 165-168.

The establishment of these districts provoked the passage of "Red Light Abatement" laws in most states, and, since World War II, there has been nearly-uniform policy of police repression throughout the country.[49]

What most repels us from the licensing of prostitution is that it puts organized society into the position of condoning and approving. Yet the basic principles stated in Chapter I of this Report draw a sharp distinction between approving and condoning immoral conduct, on the one hand, and merely removing from it the hand of criminal process. Yet the proponents for licensing are driven by their logic to proposing that the city own or lease hotels in which to establish brothels, have them administered by the city, and rent the rooms to prostitutes by the day (or night), week or month!

The Wolfenden Committee, which studied and reported on the laws concerning prositution in Great Britain, recommended against licensed brothels.[50] It said,

> "...prostitution can be eradicated only through measures directed to a better understanding of the nature and obligations of sex relationships and to a raising of the social and moral outlook of society as a whole. The licensing and toleration of brothels by the State would make nonsense of such measures, for it would imply that the State recognized prostitution as a social necessity."

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[49] George, supra, note 18, at 734. Prostitution in Nevada is not subject to control by state law. Thus, the regulation of prostitution is left to the counties. While Washoe County (Reno) and Clark County (Las Vegas) have laws making prostitution illegal, other counties have permitted brothels to exist.

[50] The Wolfenden Report, supra, note 6.

It will be seen that the Wolfenden Report speaks, not only of licensing brothels, but of "tolerating" them. It argues that the existence of the "tolerated" brothel would encourage recruitment of women. Wolfenden may here be speaking of the "tolerated brothel" as one that has been "licensed." If so, we agree. If, however, Wolfenden attaches disapproval to unlicensed but non-illegalized off-the-street prostitution, we are unable to follow the Wolfenden Report to that extent, just as we are unable to follow those who would license prostitution. We share Wolfenden's conclusion that prostitution should be kept off the streets. Keeping prostitutes off the streets may be aided by tolerating them off the streets, and we find it difficult to imagine that tolerating them off the streets would recruit more women than pimps are doing now.[51]

Our final conclusion is that:

(1) The laws against on-the-street activity should be continued and enforced;

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[51] Wolfenden also reported that:

> "All but two European countries have now abolished them (tolerated brothels) and there are at the present time only 19 countries with tolerated brothels as against 119 'abolistionist' countries."

But the experience of other countries, while important to consider and study, cannot be controlling.

(2) The laws against pimps should be continued and enforcement stepped up, because the activity of pimps is not "non-victim crime;"

(3) Discreet, private, off-the-street prostitution should cease to be criminal.

The repeal of Penal Code Section 647b would enable counties and cities and counties to regulate the act of prostitution as they see fit.

If it is too sanguine to suppose that the state legislature will make this change in the near future, nevertheless, our Report may induce others in California to take a fresh look at prostitution and criminal justice, as we have done. We can hope that they will reach conclusions similar to ours. But meanwhile the criminal justice system in San Francisco can ill afford to wait out the time that may elapse before such a change takes place. What should it do in the meanwhile?

What it must do is to come as close to the desired system as it can by a policy of selective enforcement, adopted in the manner advocated in Part I of this Report,[52] that is, by the collective determination

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[52] A Report on Non-Victim Crime in San Francisco, Part I: Basic Principles; Public Drunkenness, issued April 26, 1971.

of all the agencies of criminal justice, and the municipal health authorities under central municipal leadership.

By recommending selective enforcement of the prostitution laws, we recognize an unfortunate fact of life and seek to direct enforcement into more rational and less costly efforts. San Francisco urgently needs its police resources, and the resources of its courts and jails, for handling crimes that are far more serious.

III. GAMBLING

Gambling is an activity of humans that occurs on two levels. One is typified by Sky Masterson in "Guys and Dolls," betting on which of two raindrops on a window pane will reach the bottom first: two "guys" getting pleasure or excitement out of chance. The other consists of commercialized operations, in which hard-eyed men organize machinery to profit from the blandishment that chance has for the frailty of humans. The first seems as old as mankind and is doubtless incurable. The second is as old as the rapacity of some men to profit from the weakness of others. If crime is involved in the first, it is non-victim crime. But crime in the second is not non-victim crime at all, for it does involve injury to society.

The weakness of the law's approach to gambling is, first, its failure to perceive that gambling does take place on these two levels and that these are wholly different in character, and, second, its erratic and capricious treatment of gambling on each level. Much, but not all, non-victim gambling is made criminal, and some victim gambling is treated as perfectly lawful. Thus, betting on horses in California has been lawful since 1933 on the spurious justification that racing encouraged "agriculture and the breeding of horses," as if society had any interest in "the breed" except as a tool for gambling.[1]

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[1] Pari-mutual betting on horses was permitted by the addition of Art. IV, Sec. 25a to the California Constitution in 1933. In the same year, the Legislature enacted the "Horse Racing Act," the purpose of which was "...the encouragement of agriculture and the breeding of horses in the State of California." Cal. Stats. 1933, Ch. 769, Sec. 4, p. 2048. See: In re Goddard, 24 C.A. 2d 132, 137 (1937).

Various forms of gambling, ranging from stud poker to slot machines, are made illegal by state law.[2] Yet the state has not made all forms of gambling "illegal." For example, while "banking or percentage" card games, including stud poker, are illegal, draw poker[3] and bridge[4] have been held by the courts to be predominantly games of skill, not prohibited by state law.[5] Moreover, San Francisco and other cities have legislated against gambling in areas not covered by state statutes.[6] Thus Section 260 of the San Francisco Municipal Police Code prohibits "any game of chance of any kind whatever in a public place open to public view." And Section 288 of the Police Code makes it a misdemeanor to visit or maintain a place where "gambling" is carried on or conducted. It is this latter statute -- Section 288 -- that is charged in most of the gambling cases in San Francisco.[7]

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[2] Secs. 330-337.5 P.C.

[3] In re Hubbard, 62 C. 2d 119, 41 Cal. Rptr. 393, 396 P. 2d 809 (1964).

[4] In re Allen, 59 C. 2d 1, 377 P. 2d 280 (1962).

[5] Ordinary pin-ball games have also been classified as "games of skill." Knowles v. O'Connor, 266 C.A. 2d 31, 71 Cal. Rptr. 879 (1968).

[6] See In re Hubbard, supra.

[7] In 1969, charges for "keeping" or "visiting" a place of gambling accounted for 419 out of 425 formal charges filed by the police. S.F.P.D. Annual Report, 1969, p. 166.

Just as the law is erratic in what gambling it declares to be illegal, law enforcement is erratic about when and against whom it will enforce the law. These laws are applied with some energy against the poor and the minority communities, while gambling in more affluent communities goes virtually untouched. This difference in treatment is even written into the law itself in Section 277 of the Municipal Police Code. Although that section prohibits "any game of chance of any kind whatever in a public place," it then allows dice to be "...thrown for merchandise within a place of business where such merchandise is ordinarily sold." This broad language is designed to allow an exception in the law for the favorite pastime of rolling dice for drinks, lunch or dinner. It cannot be explained to men from the Black communities like the Western Addition who are arrested on a Friday afternoon for rolling dice in a garage. The distinction cannot be based on differences in chance or in value, since the cost of drinks and dinner at a good San Francisco restaurant is far more than the stakes at any backyard crap-shoot. The difference is one of cultural values, carved into the law to protect a cultural pastime of the majority.

Section 277 writes a discrimination into the law. More pervasive is the inequality in the way that all gambling laws are enforced. During 1969, the police charged 593 persons with gambling offenses in San Francisco. Of these, 396, or sixty-seven percent (67%) were Black. Eighty-six percent (86%) of those charged were minority citizens, while only fourteen percent (14%) were white.[8] Yet everyone knows that

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[8] S.F.P.D., Annual Report, 1969, pp. 146-147.

gambling in San Francisco is not confined to minority communities, and much goes on in even the most respectable areas of white society, including private clubs, church functions and charitable affairs. Some judges who hear gambling cases have been outspoken in their criticism of the unequal enforcement of gambling laws. On July 10, 1969, for example, Municipal Judge Albert Axelrod, presiding over a case involving the arrest of 49 persons for gambling in the Western Addition, commented that he believed that the police were singling out the Fillmore District for enforcement of gambling laws, leaving gambling in private clubs untouched. On November 4, 1969, the late Judge Fitzgerald Ames stated from the bench, "I'm sick and tired of seeing only Black defendants here on gambling charges. You can't tell me that white people in this city don't do any gambling."

The enforcement of anti-gambling laws in San Francisco has been largely along racial lines. Yet there is no process of rational inquiry which can justify that kind of enforcement. If the unspoken rationale of this discrimination is that anti-gambling laws are necessary in order to protect the poor from their own weaknesses, it takes little reflection to see that the rationale has no justification. Any law that expressly legalized gambling for the rich and outlawed it for the poor would amount to denial of the equal protection of the laws in violation of the Fourteenth Amendment. Government should not and constitutionally cannot engage in enforcement practices that would be illegal if these practices were codified by law.

It must be conceded that the financial burden of enforcing laws against gambling has not been great. The arrests by San Francisco police in 1969 for gambling accounted for only slightly more than one percent of the 59,104 total arrests made that year. Gambling arrests accounted for less that 5% of the arrests made during 1969 by the Bureau of Special Services, known more familiarly as the "Vice Squad."[9] Only 36 persons were sentenced to county jail for gambling offenses.[10] The old Chinatown Detail, which consisted of six plainclothes officers who made regular and ineffectual checks on Chinese gambling parlors, has been disbanded.

But the measurable dollar cost of enforcement is only part of the costs. There are often other and unmeasurable costs suffered by society when laws against non-victim crime are enforced. One of these costs is the lack of respect, the bitterness that is engendered when the law is enforced unequally among classes of citizens. When the law bears down on the conduct of the poor and of racial minorities, leaving identical conduct by the more affluent untouched, then the poor and

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[9] Id. at p. 48.

[10] Id. at p. 167.

minority citizens rightfully feel that the law is simply for the rich and against them. If in fact the law is hypocritical in seemingly small matters, it is hard for the law to hold out a convincing honesty in matters more important.

Another unmeasurable cost is that the police are left with a huge measure of discretion in the enforcement of gambling statutes.[11] In effect, the police must become a buffer between hypocritical laws and realistic law enforcement. This is a truly monumental task, and it is little wonder that the police are often caught between the letter of the law and community sentiment. Consider for example, what happened during the last football season when the police gambling detail made an arrest involving a "runner" (card collector) for an organized football betting pool.[12] The "runner" was arrested on a Saturday night; on the following Monday, the police, for whatever reasons, issued a public statement explaining that the arrest was not the precursor of a crackdown on football pools.[13] The head of the anti-gambling squad explained that most people regarded the football pools as perfectly proper, so that the police could not get the kind of information they needed to make arrests.[14]

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[11] See: SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY, John Wiley & Sons Pub., 1967.

[12] "There's No Football Pool Crackdown," S.F. Chronicle, Oct. 5, 1970, p. 36.

[13] Id.

[14] Id.

Another unmeasurable cost is the loss of respect for law when it tries to illegalize what the people largely desire. Certainly much of the reason why gambling laws are not enforced against church bingo games, football pools and private clubs is that most people in the community do not want the laws enforced against these activities. It is not simply a matter of whether the police could get evidence. Rather, by refusing to enforce broadly-drawn laws to the letter, the police save themselves -- and the rest of the legal system -- from public ridicule. Anti-gambling laws still try to prohibit all people from engaging in any activity that many people want to pursue. And this has been true since at least Biblical times. There are as many ways to gamble as there are chances in the world. There is no way for the law to prevent gambling or to prevent people from losing money at it.

Furthermore, the selective enforcement of gambling laws in San Francisco has little effect, if any, on whether poor people will lose more money than they can afford. Any poor person who wants to gamble legally can do so very easily right now. Two Bay Area racetracks, open six months of the year, are easily accessible by local bus from San Francisco. A San Francisco bettor has access to Golden Gate fields for $1.10 round-trip A.C. transit fare and the price of admission. Anyone with $9.30 can buy a round-trip ticket to South Shore Tahoe any weekday and obtain a refund of $8.00 in cash, plus a drink, when the bus reaches the Lake.

It must be self-evident, under the principles stated in Chapter 1 of the San Francisco Crime Committee's Report on Non-Victim Crime, that criminal laws against gambling on the first level simply cannot be justified at all. That is to say, laws making gambling criminal cannot be justified on any purpose to prevent gambling. They cannot be justified as an attempt to legislate morals or to protect people against themselves. Criminal laws against gambling on the second level are justified. When gambling becomes a large-scale commercial operation it may cease to be a matter of "non-victim crime" because the public may become a victim, and organized large gambling operators may be a corrupting influence. Society might be warranted in concluding that to be true. We need not be more conclusive, because the State Attorney General, Mr. Evelle J. Younger, has recently formed a state-wide task force to study and report on the effects of various forms of legalized gambling in New York, New Hampshire and Nevada,[15] and we can await the results of that study.

However, until there is reliable evidence that large-scale gambling is not injurious to society, laws on gambling should be tailored to prevent the operation of gambling apparatus from being organized and large. There are a number of possibilities. Corporations, partnerships,

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[15]"Big Study of Legalized Gambling," S.F. Chronicle, Feb. 11, 1971, p. 10.

and syndicates could be denied the right to run gambling establishments or operations. Or conduct of more than one establishment by the same party could be prohibited. Or the number of people participating in or visiting a game or games of chance at the same structure, building, house, or club could be limited to a small figure, say, twenty. Certainly the public advertisement of gambling or public solicitation of participation in "gambling" could be prohibited. We are aware that the Joint Legislative Committee for the Revision of the Penal Code is currently drafting proposals for change in the state's gambling laws, and we hope that they will find our suggestions helpful.

What the Committee on Crime does recommend at this time is this:

(1) Section 288 of the Police Code should be amended at least to confine it to prohibiting the maintenance of a place where gambling is carried on or conducted and to delete its prohibition of "visiting" such a place;

(2) So long as the anti-gambling laws remain on the books, they should be applied equally to all segments of our society. The city's enforcement policies on gambling should be brought into balance. Since private clubs, church games and the like should remain free from arrests for gambling, so also should the private games in garages, in the Western Addition, in Hunter's Point, and in the Mission or in Chinatown. The police should confine their efforts to the control of large games, organization, the enticement of minors, and solicitation.

IV. PORNOGRAPHY

Approximately 30 bookstores in San Francisco now specialize in the sale to adults of hard-core pornographic reading material. While the police have made several arrests for "reading materials" over the past year, these arrests have focused on publications emphasizing pornographic photographs with little text.

Most of the law enforcement relative to pornography has been aimed at pornographic films. Two police officers are currently assigned full-time to investigation and arrest of the operators of theaters showing sexually explicit films. At present there are between 20 and 25 theaters in the city regularly showing these kinds of movies. Since the Spring of 1970, the police and the District Attorney's Office have seized 33 films in connection with arrests for obscenity. These arrests resulted in 10 trials, which, in turn, produced only 3 convictions and 7 hung juries.

The convictions involved films depicting heterosexual masturbation and sexual intercourse, and lesbian oral copulation, and one cartoon found to be obscene contained depictions of bestiality. Sentences in these cases ranged from a fine of $1,000 to a six-month jail sentence with a $1,000 fine. All sentences have been stayed pending appeal.

In short, little has been accomplished by the effort to put down pornography by means of the criminal law.

A. What is Pornography? What is Illegal?

On the threshold, what to do about pornography is elusive because no one quite "knows" what "pornography" is. The word carries with it a load of condemnation and revulsion. But what is it that is revolting? We all know what pornography means, until we try to define it in words. And we are not helped much by definitions borrowed from the law, for the law on "obscenity" has been in constant flux.[1] Many people think that the law has banned either too little or too much.

One inherent difficulty in most definitions of "obscenity" or "pornography" is that they are subjective. For example, one literary critic has defined pornography as "...the representation of directly or indirectly erotic acts with an intrusive vividness which offends decency without aesthetic justification."[2] California's basic

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[1] See: Magrath, The Obscenity Cases: Grapes of Roth, 1966 Sup. Ct. Rev. 7; also United States v. Reidel (U.S. Supreme Court, May 3, 1971), 39 L.W. 4523.

[2] George P. Elliott, "Against Pornography," in Perspectives on Pornography, Hughes ed. (St. Martin's Press, 1970), pp. 74-75.

obscenity statute, Section 311 of the Penal Code, is as subjective as other definitions.[3] It was drafted to conform with decisions of the United States Supreme Court[4] and defines "obscene matter" as:

> ...matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

The President's Commission on Obscenity and Pornography refused to use the term "pornography" because "... it appears to have no legal significance and because it most often denotes subjective disapproval of certain materials, rather than their content or effect." Accordingly, the Commission addressed itself to "... a wide range of explicit sexual depictions in pictorial and textual media."[5] We, however, choose to narrow this concern somewhat. Our focus has been on books, movies and live stage shows commercially available in San Francisco.

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[3] Penal Code Sec. 311 is reproduced in full in Appendix C to this Report.

[4] Notably Roth v. United States, 354 U.S. 476 (1957), A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966). See: "Legal Considerations Relating to Erotica," in Commission on Obscenity, supra, p. 295.

[5] The Report of the Commission on Obscenity and Pornography, p. 3, n. 4 (1970).

Whether the distribution of books, newspapers, photographs or movies (and other forms of media) is illegal under present law must be tested by the definition of Penal Code Section 311. And the test applies to "obscene live conduct" as well. A somewhat different standard applies to the distribution of "harmful matter" to minors.[6]

B. How is Something Found to be "Obscene?"

Nearly all convictions for the sale or distribution of obscene matter are appealed to higher courts, and in the past they reviewed obscenity convictions on a case-by-case basis.[7] Recent efforts have attempted to set down more precise standards for lower courts to follow. Yet this process of formulating legal standards has not been easy. As one Justice of the California Supreme Court wrote recently,[8]

> It is no novel revelation that the passage of years since the United States Supreme Court first attempted a constitutional definition of obscenity * * * has produced * * * a multiplicity of standards. Throughout this period, courts have struggled to find an accomodation between the constitutionally protected interest in free speech and the legitimate public interest in controlling activities which fall under the broad category of obscenity.

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[6] Penal Code Sec. 313, et seq. See Appendix C.

[7] See, e.g., United States v. One Book Entitled "Ulysses," 72 F. 2d 705 (2 Cir. 1934).

[8] Tobriner, J., dissenting in People v. Luros, ____ C. 3d ____ (1971).

As this quotation shows, the public desire to ban matter felt to be offensive to decency has conflicted with interpretation of the freedom of speech protected by the First Amendment to the Constitution of the United States. One of the roots of the First Amendment is the conviction that society profits by free transmission of ideas. The attempt to apply this to "pornography" requires some determination of where lies the border between transmission of ideas and titillation for profit or depravity. That border has been difficult to find. The Supreme Court has recently reiterated that "obscenity is not within the area of constitutionally protected speech or press,"[9] but the limits of the one cannot be found without marking the limits of the other.

Of recent judicial decisions, by far the most influential have been those in the following areas: (a) private possession of obscene materials; (b) procedures to be followed in the issuance of search warrants in obscenity cases; and (c) requirements of proof of "contemporary community standards" in obscenity trials.

In Stanley v. Georgia, 394 U.S. 557, 568 (1969), the United States Supreme Court held that "...the First and Fourteenth Amendments

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[9] U.S. v. Reidel, 39 L.W. 4523 (1971).

prohibit making mere private possession of obscene material a crime." This rule is reflected in the California obscenity statutes, which make distribution, but not mere possession, of obscene materials criminal. But the Constitution does not preclude making a crime of the distribution of obscene materials to willing recipients.

Before 1969, the San Francisco police made arrests for showing allegedly pornographic films in the following manner: (a) Police officers would attend a film showing and would then prepare detailed affidavits describing what they saw; (b) the affidavits were then reviewed by a Municipal Court judge and a Deputy District Attorney; (c) if the judge found that there was reasonable cause to believe the film illegal, he would issue warrants authorizing the police to seize the film and to arrest the owner or disbributor. That procedure was upheld by the California Appellate Courts so long as the police seized an amount of film that was "... no more, and no less, than would be necessary to establish obscenity at a later adversary proceeding."[10] Moreover, the police were not required to present evidence to the judge as to whether the content of the film violated "contemporary community standards" of candor and decency.[11] In

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[10] People v. De Renzy, 275 C.A. 2d 380, 387, 79 Cal. Rptr. 777 (1969).

[11] People v. De Renzy, supra; Aday v. Superior Court, 55 C.2d 789, 13 Cal. Rptr. 415, 362 P. 2d 47 (1961).

September 1969 the United States District Court for the Northern District of California held that the Municipal Court could no longer issue search warrants for the seizure of allegedly obscene films unless that court first held an adversary hearing on the issue of the film's obscenity.[12] The decision was reversed by the United States Supreme Court in April, 1971.[13]

Although the California State Courts have not required the prosecution to show that "obscene matter" violates contemporary community standards at the time a search warrant is issued, they do require proof at trial that allegedly obscene material "goes substantially beyond" contemporary standards of candor and decency. In holding that the prosecution should put on "expert testimony" of community standards, the California Supreme Court said in 1968:

> We cannot assume that jurors in themselves necessarily express or reflect community standards; we must achieve so far as possible the application of

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[12] Natali v. Municipal Court, 309 F. Supp. 192 (N.D. Cal. 1969).

[13] Demich, Inc. v. Ferdon, _____ U.S. _____(1971).

> an objective, rather than a subjective, determination of community standards.[14]

The Court also defined the relevant "community" as the entire State of California, so that, in theory, the prosecution must put on expert testimony to the effect that any given book, photograph, or film violated statewide standards of candor and decency.

If there is a common theme to these decisions, it is that the courts do not much trust anyone to censor what adults may choose to see or read. First of all, the courts do not trust themselves. Nor do the courts place an abiding faith in juries. The attempt of the California Supreme Court to find an "objective" standard for obscenity reflect an apprehension that juries, without evidence of community standards, would simply apply their own moral notions to allegedly obscene matter. In part, the statewide test was obviously designed to avoid the anomaly of having a book or movie banned in Oakland and distributed legally in San Francisco. In the long run, this search

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[14] In re Giannini, 69 C. 2d 563, 574-575, 72 Cal. Rptr. 655, 446 P. 2d 535 (1968). In 1969, the legislature added Penal Code Sec. 312.1, specifying that "neither the prosecution nor the defense shall be required to introduce expert witness testimony..." This statute has not been tested by the courts. Someone may argue that expert testimony is constitutionally required. In San Francisco, the two police officers regularly assigned to pornography prosecutions have travelled extensively throughout the state and have been qualified as "experts" on statewide standards.

for an objective standard will fail. "Pornography" and "obscenity" are what offend. The test is of necessity subjective, and it is subjective to the community.[15]

We cannot believe that "statewide community standards" means very much in fact. Is the jury bound by the most permissive standard in the state, or by the mean average? If breasts are covered in Red Bluff and bare in San Francisco, can Stockton require covered breasts, or must they permit something to show?

The courts have not succeeded very well in drafting strict standards or in aiming at "objective" tests for obscenity and pornography. The truth of the matter is that there can be no objective test for ascertaining what is pornography. Words such as "prurient interest," "contemporary standards," "customary limits of candor," and "redeeming social importance" -- the words which attempt to define "obscenity" -- are no more than linguistic codifications of highly personal moral feelings.

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[15] A profitable analogy may be found in the history of the standard of "negligence" in personal injury cases. About 75 years ago the great Justice Oliver Wendell Holmes, then on the Supreme Judicial Court of Massachusetts, insisted that the standard of "due care" was for judges, not juries, to decide (I Holmes-Pollock Letters 85, Harvard Press, 1941). Sixty years later the United States Supreme Court was holding that courts can place almost no bridle on juries Rogers v. Missouri Pacific Co., 352 U.S. 500 (1957).

C. What "Pornography" Should Be Brought Under Criminal Law.

In short, no guide can be found in judicial decisions or supposed Constitutional standards as to what "pornography" shall be criminally condemned. On May 3, 1971, the United States Supreme Court observed (U.S. v. Reidel, 39 L.W. 4523):

> It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition of unwilling recipients of whatever age. The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential. This may prove to be the desirable and eventual legislative course. But if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances.

In order to determine what laws should be passed, repealed or amended, it is necessary to get back to the basic principles by which to test what conduct should be made criminal as a matter of sound public policy.[16]

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[16] See Chapter I for the 7 principles.

We state now the conclusions we reach by the application of those principles. There should be no prohibition of:

(1) What adults choose to read, see, or do in private.

(2) The discreet and private sale of pornography by one adult to another.

(3) The display of pornography in the flesh, film, or stage to adults in an off-the-street reticent surrounding; that is to say, in such a way as to come to the attention only of those who seek it out.

(4) Discreet commercial advertising that merely informs the public about the availability of sexual materials and is not vulgar, salacious, or lewd on its face.

There <u>should</u> be prohibition of:

(5) Sale or display to minors.

(6) Public display or exhibition whereby the pornography is thrown before or called to the attention of the general public, the passerby.

(7) Commercial advertising or solicitation that is offensive, vulgar, lewd or obscene.

If some of these proposals offend some of the public as too liberal, others may be objected to as violating constitutional rights. But if the Constitution as interpreted by the courts should be found to stand in the way, confrontation with sound policy carefully thought out may lead to reinterpretation of the Constitution. And, if the courts remain doctrinaire and unmovable, the Constitution can be amended.

The remainder of this Chapter tells how we have reached the conclusions enumerated above.

D. Pornography and "Harm": Why Is the Distribution of Pornography Made Criminal?

Our Third Principle of the proper application of the criminal law specifies that: "Every person should be free of coercion of criminal law unless his conduct impinges on others and injures others, or if it damages society." It is often argued that pornography is of itself "harmful," that in and of itself it causes injury to society. Among the kinds of harm said to result from the distribution of pornography are the following:

(a) That pornography causes crime;

(b) That it is offensive to most people; and

(c) That it leads to a decline in civilization.

(a) The Contention that Pornography Causes Crime

According to the President's Commission, 49% of the American public in 1969 believed that viewing explicit sexual materials led people to commit rape.[17] But the Commission concluded, in 1970, that there was no "substantial basis" for belief that erotic materials are a "significant determinative factor" in causing crime and delinquency.[18] On the other hand, it found the data so insufficient that it did not "absolutely * * * disprove such a connection."

> * * it is obviously not possible, and never would be possible, to state that never on any occasion, under any conditions, did any erotic material ever contribute in any way to the likelihood of any individual committing a sex crime. Indeed, no such statement could be made about any kind of nonerotic material. On the basis of the available data, however, it is not possible to conclude that erotic material is a significant cause of sex crime.

Given the increasingly widespread distribution of pornography in San Francisco over the past year, one would expect to find a corresponding increase in forcible rapes reported to the police if a

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[17] Commission on Obscenity, p. 158.

[18] Id. at pp. 242-243.

a causal relationship existed between pornography and rape. Yet over the past ten months,[19] forcible rapes reported to San Francisco police, with ups and downs, have shown a decreasing trend.[20]

In short, we have found no reliable evidence demonstrating a causal relationship between pornography and victim crime. The mere undemonstrated possibility of a connection is not enough to support the prohibitions of criminal law. "A million possibilities do not make a probability."[21] Justification for making conduct relative to pornography a crime must be found elsewhere, and it can be found for some prohibitions.

(b) The Contention that Exposure to Pornography Is Offensive to Most People

Most people do not want to be exposed to erotic sexual materials without exercising some choice in the matter.[22] When erotica is

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[19] June, 1970 through March, 1971.

[20] San Francisco Police Department, Bureau of Criminal Information, "Preliminary Crime Summary Reports" for months indicated. There were 488 cases of forcible rape reported to the police during the months indicated, a decrease from 580 forcible rapes reported during the same months of the previous year.

[21] Judge Alfred C. Arraj, United States District Judge, District of Colorado.

[22] Commission on Obscenity, pp. 155-158.

displayed publicly, when it is sent through the mails without express request, most people respond antagonistically, from annoyance to outrage. For some, erotica itself strikes at deeply-held religious convictions about sex. For others, exposure to erotic materials is more a matter of aesthetic preference: They prefer not to have materials that they consider ugly thrust upon them.

Annoyance, revulsion, or disgust are all very real kinds of "harm." Moreover, most citizens are probably outraged by the distribution or display of explicit sexual materials in public. Our Sixth Principle, set out in the Introduction to this Report, stated that "The Criminal Law cannot lag far behind a strong sense of public outrage." We believe that the criminal law acts properly in prohibiting both the public display of pornography and the dissemination of unsolicited sexual materials.

(c) The Contention that Distribution of Pornography Leads to a Decline in Civilization

Some authors have postulated a connection between sexual permissiveness and the "cultural decline" of civilization.[23] It is said that sexual freedom inhibits rationality, philosophical speculation and "advanced civilization."[24] The argument

[23] Among them are J.D. Unwin, Pitirim Sorokin, Arnold Toynbee, and Bruno Bettelheim. See: Christenson, "Censorship of Pornography? Yes.," in The Progressive, Sept. 1970, pp. 24-25.

[24] Id.

has two parts: (a) that exposure to erotica causes sexual permissiveness, and (b) that sexual permissiveness impedes "progress." The argument merits careful consideration. It may not be lightly brushed aside. While it does not seem to bear up well on purely intellectual analysis, history is marshalled in its support.

In opposition to this argument for placing criminal sanctions on pornography, there is a laissez faire attitude that says that in a democracy "progress" is no more and no less than what most people say it is, that our most basic notions of the meaning of "progress," including notions of proper sexual conduct, are undergoing serious examination by many people, particularly the young, and that it is not for society to say whether ideas about sexual permissiveness will, or should, win out. According to this point of view, the state has no business applying criminal sanctions to depictions of sexual conduct viewed voluntarily by adults, in order to preserve something as tenuous as "progress."

We do not agree with this argument. A society has a right to preserve its notion of progress. But it is unnecessary to resolve that argument at this juncture, for the simple reason that there is no convincing connection between erotica and permissiveness. The President's Commission concluded:

> The findings of available research cast considerable doubt on the thesis that erotica is a determinant of either the extent or nature of individuals' habitual sexual behavior.[25]

Young people clearly constitute the most sexually permissive segment of our society. Yet they are rarely the purchasers of pornography in San Francisco. The average buyer of erotica in this city is a middle-aged male. It seems likely, therefore, that pornography is more a substitute for sexual permissiveness than a cause of it.

(d) Minors Should Not Be Exposed to Pornography

In Part I of this Report,[26] we set out, as a principle to be applied to our study of non-victim crime, the proposition that "society has an obligation to protect the young." In the area of pornography, protection of minors is a justifiable goal for the criminal law. The President's Commission found no evidence to suggest that exposure to explicit sexual materials leads juveniles to commit delinquent acts.[27] But that misses the point entirely. In our society, education and upbringing about sexual conduct have been entrusted to the family. Whether they should also be entrusted to

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[25] Commission on Obscenity, p. 194.

[26] Issued April 26, 1971.

[27] Commission on Obscenity, p. 225.

the schools is another question. But it is appropriate to preserve them from commercial intrusion. Laws prohibiting the distribution of sexual materials to juveniles without parental consent are justified not because they prevent "crime" or "delinquency" but rather because they protect the privacy of moral education.

But how far should the law go in its aim of protecting juveniles from pornography? It should be obvious, for example, that the state could achieve an absolute prohibition on the distribution of erotica to juveniles only if the state were to ban erotica completely. This the state cannot do, since the effect of such a prohibition would "reduce the adult population ... to reading only what is fit for children."[28] On the other hand, it is clear that the state can legislate directly against the distribution or dissemination of explicit sexual materials to juveniles,[29] and California has done just that. In 1969, the legislature enacted a statutory scheme prohibiting the distribution of "harmful matter" to persons under 18 years of age.[30] The law allows parents to give their children whatever books

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[28] Butler v. Michigan, 352 U.S. 380, 383 (1957) (Opinion by Justice Frankfurter).

[29] Stanley v. Georgia, supra; Jacobellis v. Ohio, 378 U.S. 184 (1964); People v. Luros, supra (Tobriner, J. dissenting).

[30] Penal Code Sec. 313, et seq. See Appendix C.

the parents wish and to take their children to movies as they see fit, thereby permitting parents to decide what their children should or should not see or read.[31] We believe that the current statutory scheme prohibiting the distribution of "harmful matter" to juveniles makes sense as it stands.

(f) Some Conclusions on "Harm"

Our study of "pornography" has not disclosed sufficient harm to society to justify the application of criminal sanctions to erotica read or viewed in a private place by adults. However, we do find that criminal sanctions are proper in order to prohibit:

(1) The sale or display of explicit sexual materials to minors; and

(2) Offensive or salacious public displays of sexual themes or materials.

In the first instance, the "harm" is done to our sense of the privacy of the family and home. In the second, the "harm" is one of affront, embarrassment, or disgust of the public at large.

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[31]Penal Code Sec. 313.2.

On the other hand, there are measurable harms in prohibiting the distribution of "obscenity" to adults who want it. The first, and most important of these, is that there is no way for the law, depending as it must on language as a tool for defining its rules, to arrive at precise or objective standards for obscenity. This necessary vagueness, in turn, has two consequences. One is that, throughout history, artistic works have been swept up by obscenity laws, often finding vindication only in our highest courts.[32] Joyce's Ulysses and D. H. Lawrence's Lady Chatterly's Lover were both banned by obscenity statutes.[33] Not many years ago, North Beach book-sellers stood trial in San Francisco for selling poetry that later found its way into major anthologies.

Another consequence of the necessary precision of obscenity statutes is that the interpretation of those laws makes the courts look erratic. The public at large comes to think that justice is uncertain, and it is. This measure of arbitrariness is not, however, rightfully attributed to any misfeasance by the courts. Rather,

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[32]For a history of obscenity prosecutions, see Ernst & Schwartz, Censorship: The Search for the Obscene, (MacMillan Co., 1964).

[33]Id. at p. 127, et seq.

conflicting interpretations are what we must expect when we ask the courts to become the final arbiters of what is "obscenity."

Some people point to a second kind of identifiable "harm" that comes from the enforcement of obscenity laws. For example, Justice Mathew O. Tobriner of the California Supreme Court wrote recently:[34]

> In our highly complex and increasingly interdependent society the need to preserve the individual's freedom of thought has become crucial. The individual has been confronted with the rise of tremendous power in government and in the so-called technostructure that tends to compel conformity and standardization. The central issue of our time must be to preserve the identity of the individual in the face of a dangerous depersonalization and dehumanization.

We think this a gross exaggeration of fear as applied to pornography and obscenity. But there is enough in it to work against applying obscenity laws to sexual materials viewed voluntarily by adults.

Finally, there is a curious kind of harm that has resulted from the arrest and prosecution of the owners of movie theaters

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[34] People v. Luros, supra, (Tobriner, J. dissenting).

showing pornographic films in San Francisco. The one recognizable consequence of these prosecutions is that they have made the city's pornography more important than it should be. Notorious prosecutions have created an aura of intrigue and mystery, and citizens of San Francisco have naturally responded by going to see what the fuss is all about. Just as commercial book-sellers have never greeted being "banned in Boston" with great dismay, so too, some commercial theater owners in the city have been able to depend on a constant supply of headlines manufactured by obscenity prosecutions.

A number of members of the Committee have viewed "pornographic" films at a theater suggested by the police. Apart from remarking that we found the films extremely bad, we see no need of adding additional comments, since to do so would simply add to these films an unwarranted dimension of importance.

D. Public Display and Commercial Advertisement

We have said that we believe the criminal law acts properly by prohibiting the distribution of sexual materials to minors, and we have affirmed our approval of the California statutes (dealing with "harmful matter") which do so.

We believe that the criminal law acts properly in prohibiting public display, that is, display to those who do not seek it out.

The public display of erotica, whether on posters, marquees or magazine stands, or whether it appears in newspaper advertisements, obviously reaches minors. But even were it to reach adults alone, and although adults ought to be able to see or read if and what they choose, we see no need to have the citizens of San Francisco bombarded with bad taste. To be specific, we think that the obscene neon signs and the salacious suggestions of the doorway barkers in North Beach should be prohibited.

On these conclusions it seems obvious that obscene advertising should be prohibited. Obscene public advertising is objectionable whether the motion picture, stage performance or book it advertises is obscene or not. Indeed, if what is advertised is not obscene, the advertisement is no more than degraded huckstering that possesses no conceivable social virtue. While there are important values at stake in letting adults see or read whatever they choose, there are no similar values in allowing theater owners or book-sellers to advertise in whatever manner they choose. It is nearly certain that criminal statutes aimed directly at vulgar, salacious or obscene public advertising would pass constitutional muster.[35] Indeed, a

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[35] See: "Legal Considerations Relating to Erotica," in Commission on Obscenity, supra, p. 295 et seq.; People v. Luros, supra, (Tobriner, J., dissenting).

model statute aimed at offensive public display was proposed by the President's Commission.[36] Some may say that the problems of drafting statutory standards for offensive public display will be identical to the problems inherent in drafting standards to apply to books or movies themselves, so that the courts will be just as busy trying to figure out what is prohibited. However, we think it likely that the courts will properly feel that they can trust juries to decide what is vulgar or salacious public display. The constitutional right of free speech, we observe again, exists to protect ideas and their dissemination. To that end courts tend to be sensitive to encroachments. No such extreme sensitivity is to be expected in the protection of the pursuit of dirty money. Prohibitions on vulgar public display, such as offensive commercial advertising, simply do not involve the risk that the community at large will be deprived of its chance to see or read what it wants. Juries, and not courts, ought to determine the public aesthetic tenor of their communities.

What, then, about discreet, non-obscene advertisement of obscene material? The purpose of advertising should be to inform the public about the availability of commerical wares, and it is entirely possible for advertsing to let adults know the availability of sexual materials without resort to vulgarity.

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[36] Commission on Obscenity, supra, at p. 67.

For example, theaters can advertise films as "Adult Entertainment" or as "Sexually Explicit." Erotic books or magazines need not have erotic covers, or, if they do, they can be kept in rooms not accessible to minors. It is therefore argued that this kind of neutral, sedate advertising should not be prohibited. And there is logic in the argument that if the discreet, private viewing of obscene material by adults should not be prohibited, the non-offensive advertisement of what itself should not be criminal ought not to be prohibited. To that argument it is answered that society does have some rights to protect its own standards of civilization, so long as it does not encroach on freedom of thought, freedom of non-victim action, and of communication of ideas, and therefore society has a right to prohibit the enticement of the public to offensive material, when the enticement is motivated by nothing nobler than acquisition of money. The public enticement to salaciousness of those who would otherwise not view it is not non-victim crime at all; the public is the victim. So the answer runs.

To enforce laws against in-offensive advertisement of obscene material would require someone to determine whether the material is obscene. This must be a jury. This brings one back to all the difficulties now encountered in determining whether a book, stage performance, or motion picture is obscene. Those who favor prohibition of advertising of pornography argue that the result of passing

judgment on the obscenity of the material will not be to prohibit the material but only to prohibit the commercial enticement of people to view or read it, and that the great social values that courts have sought to protect by their search for some objective standard of obscenity are not at stake. They argue that, while judgments of juries are subjective and often capricious, they represent a cross-section of public consciousness; if juries can judge whether a motorist has "negligently" injured another or whether a businessman has "unreasonably restrained trade," they can with equal propriety be entrusted with the task of determining whether material is so "obscene" as not to be publicly and commercially advertised.

The pros and cons make the choice difficult. Our final conclusion is that discreet, non-obscene advertisement should not be prohibited. This conclusion is produced by consideration of the fourth and seventh of the basic principles set forth in Chapter I of Part I of this Report on Non-Victim Crime:

"Fourth Principle: When government acts, it is not inevitably necessary that it do so by means of criminal processes."

"Seventh Principle: Even where conduct may properly be condemned as criminal under the first six principles, it may be that

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[36] Commission on Obscenity, supra, at p. 67.

the energies and resources of criminal law enforcement are better spent by concentrating on more serious things. There is a matter of priorities."

On the one hand, the attempt to enforce criminal prohibitions of non-salacious advertising of books or private performances is likely to be an expensive and futile use of law enforcement resources. On the other hand, it would be better to spend that kind of money on efforts for education for decency. Pornography for profit is highly reprehensible, but in the end it is also boring.

Our recommendation against prohibiting sedate announcements of private obscenity may prove, in practice, to be mistaken. There will be time enough to change it if that turns out to be the fact. Meanwhile, the effort of the criminal law should concentrate on protecting minors, on putting down public display, and on prohibiting unsolicited distribution.

For example, theaters can advertise films as "Adult Entertainment" or as "Sexually Explicit." Erotic books or magazines need not have erotic covers, or, if they do, they can be kept in rooms not accessible to minors. It is therefore argued that this kind of neutral, sedate advertising should not be prohibited. And there is logic in the argument that if the discreet, private viewing of obscene material by adults should not be prohibited, the non-offensive advertisement of what itself should not be criminal ought not to be prohibited. To that argument it is answered that society does have some rights to protect its own standards of civilization, so long as it does not encroach on freedom of thought, freedom of non-victim action, and of communication of ideas, and therefore society has a right to prohibit the enticement of the public to offensive material, when the enticement is motivated by nothing nobler than acquisition of money. The public enticement to salaciousness of those who would otherwise not view it is not non-victim crime at all; the public is the victim. So the answer runs.

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APPENDIX A

Excerpts from the Report of the Committee on Homosexual Offenses and Prostitution, Great Britain (The Wolfenden Report) (1963)

Para. 52. We have indicated (in Chapter II above) our opinion as to the province of the law and its sanctions, and how far it properly applies to the sexual behaviour of the individual citizen. On the basis of the considerations there advanced we have reached the conclusion that legislation which covers acts in the third category (private acts) we have mentioned goes beyond the proper sphere of the law's concern. We do not think that it is proper for the law to concern itself with what a man does in private unless it can be shown to be so contrary to the public good that the law ought to intervene in its function as the guardian of that public good.

Para. 53. In considering whether homosexual acts between consenting adults in private should cease to be criminal offenses we have examined the more serious arguments in favor of retaining them as such. We now set out these arguments and our reasons for disagreement with them. In favor of retaining the present law, it has been contended that homosexual behaviour between adult males, in private no less than in public, is contrary to the public good on the grounds that --

(i) it menaces the health of society;
(ii) it has damaging effects on family life;
(iii) a man who indulges in these practices with another man may turn his attention to boys.

Para. 54. As regards the first of these arguments, it is held that conduct of this kind is a cause of the demoralization and decay of civilizations, and that therefore, unless we wish to see our nation degenerate and decay, such conduct must be stopped, by every possible means. We have found no evidence to support this view, and we cannot feel it right to frame the laws which should govern this country in the present age by reference to hypothetical explanations of the history of other peoples in ages distant in time and different in circumstances from our own. In so far as the basis of this argument can be precisely formulated, it is often no more than the expression of revulsion against what is regarded as unnatural, sinful or disgusting. Many people feel this revulsion, for one or more of these reasons. But moral conviction of instinctive feeling, however strong, is not a valid basis for overriding the individual's privacy and for bringing within the ambit of the criminal law private sexual behaviour of this kind. It is held also that if such men are employed in certain professions or certain branches of the public service their

private habits may render them liable to threats of blackmail or to other pressures which may make them "bad security risks." If this is true, it is true also of some other categories of person: for example, drunkards, gamblers and those who become involved in compromising situations of a heterosexual kind; and while it may be a valid ground for excluding from certain forms of employment men who indulge in homosexual behaviour, it does not, in our view, constitute a sufficient reason for making their private sexual behaviour an offense in itself.

Para. 55. The second contention, that homosexual behaviour between males has a damaging effect on family life, may well be true. Indeed, we have had evidence that it often is; cases in which homosexual behaviour on the part of the husband has broken up a marriage are by no means rare, and there are also cases in which a man in whom the homosexual component is relatively weak nevertheless derives such satisfaction from homosexual outlets that he does not enter upon a marriage which might have been successfully and happily consummated. We deplore this damage to what we regard as the basic unit of society; but cases are also frequently encountered in which a marriage has been broken up by homosexual behaviour on the part of the wife, and no doubt some women, too, derive sufficient satisfaction from homosexual outlets to prevent their marrying. We have had no reasons shown to us which would lead us to believe that homosexual behaviour between males inflicts any greater damage on family life than adultery, fornication or lesbian behaviour. These practices are all reprehensible from the point of view of harm to the family, but it is difficult to see why on this ground male homosexual behaviour alone among them should be a criminal offense. This argument is not to be taken as saying that society should condone or approve male homosexual behaviour. But where adultery, fornication and lesbian behaviour are not criminal offenses there seems to us to be no valid ground, on the basis of damage to the family, for so regarding homosexual behaviour between men. Moreover, it has to be recognized that the mere existence of the condition of homosexuality in one of the partners can result in an unsatisfactory marriage, so that for a homosexual to marry simply for the sake of conformity with the accepted structure of society or in the hope of curing his condition may result in disaster.

Para. 56. We have given anxious consideration to the third argument, that an adult male who has sought as his partner another another adult male may turn from such a relationship and seek as his partner a boy or succession of boys. We should certainly not wish to countenance any proposal which might tend to increase offenses against minors. Indeed, if we thought that any recommendation for a change in the law would increase the danger to minors we should not make it. But in this matter we have been much influenced by our expert witnesses. They are in no doubt that whatever may be the origins of the homosexual condition, there are two recognizably different categories among adult male homosexuals. There are those who seek as partners other adult males, and there are paedophiliacs, that is to say men who seek as partners boys who have not reached puberty.(*)

Para. 57. We are authoritatively informed that a man who has homosexual relations with an adult partner seldom turns to boys, and vice versa, though it is apparent from the police reports we have seen and from other evidence submitted to us that such cases do happen. A survey of 155 prisoners diagnosed as being homosexuals on reception into Brixton prison during the period 1st January, 1954, to 31st May, 1955, indicated that 107 (69 percent) were attracted to adults, 43 (27.7 percent) were attracted to boys, and 5 (3.3 percent) were attracted to both boys and adults. This last figure of 3.3 percent is strikingly confirmed by another investigation of 200 patients outside prison. But paedophiliacs, together with the comparatively few who are indiscriminate, will continue to be liable to the sanctions of criminal law, exactly as they are now. And the others would be very unlikely to change their practices and turn to boys simply because their present practices were made legal. It would be paradoxical if the making legal of an act at present illegal were to turn men towards another kind of act which is, and would remain, contrary to the law. Indeed, it has been put to us that to remove homosexual behaviour between adults males from the listed crimes may serve to protect minors; with the law as it is there may be some men who would prefer an adult partner but who at present turn their attention to boys because they consider that this course

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(*) There are reasons for supposing that paedophilia differs from other manifestations of homosexuality. For example, it would seem that in some cases the propensity is for partners of a particular age rather than for partners of a particular sex. An examination of the records of the offenses covered by the Cambridge survey reveals that 8 percent of the men convicted of sexual offenses against children had previous convictions for both heterosexual and homosexual offenses.

is less likely to lay them open to prosecution or to blackmail than if they sought other adults as their partners. If the law were changed in the way we suggest, it is at least possible that such men would prefer to seek relations with older persons which would not render them liable to prosecution. In this connection, information we have received from the police authorities in the Netherlands suggests that practicing homosexuals in that country are to some extent turning from those practices which are punishable under the criminal law to other practices which are not. Our evidence, in short, indicates that the fear that the legalization of homosexual acts between adults will lead to similar acts with boys has not enough substance to justify the treatment of adult homosexual behaviour in private as a criminal offense, and suggest that it would be more likely that such a change in the law would protect boys rather than endanger them.

Para. 58. In addition, an argument of a more general character in favor of retaining the present law has been put to us by some of our witnesses. It is that to change the law in such a way that homosexual acts between consenting adults in private ceased to be criminal offenses must suggest to the average citizen a degree of toleration by the Legislature of homosexual behaviour, and that such a change would "open the floodgates" and result in unbridled license. It is true that a change of this sort would amount to a limited degree of such toleration, but we do not share the fears of our witnesses that the change would have the effect they expect. This expectation seems to us to exaggerate the effect of the law on human behaviour. It may well be true that the present law deters from homosexual acts some who would otherwise commit them, and to that extent an increase in homosexual behaviour can be expected. But it is no less true that if the amount of homosexual behaviour has, in fact, increased in recent years, then the law has failed to act as an effective deterrent. It seems to us that the law itself probably makes little difference to the amount of homosexual behaviour which actually occurs; whatever the law may be there will always be strong social forces opposed to homosexual behaviour. It is highly improbable that the man to whom homosexual behaviour is repugnant would find it any less repugnant because the law permitted it in certain circumstances; so that even if, as has been suggested to us, homosexuals tend to proselytize, there is no valid reason for supposing that any considerable number of conversions would follow the change in the law.

Para. 59. As will be observed from Appendix III, in only very few European countries does the criminal law now take cognizance of homosexual behaviour between consenting parties in private. It is not possible to make any useful statistical comparison between the situation in countries where the law tolerates such behaviour and that in countries where all male homosexuals acts are punishable, if only because in the former the acts do not reflect themselves in criminal statistics. We have, however, caused inquiry to be made in Sweden, where homosexual acts between consenting adults in private ceased to be criminal offenses in consequence of an amendment of the law in 1944. We asked particularly whether the amendment of the law had had any discernible effect on the prevalence of homosexual practices, and on this point the authorities were able to say no more than that very little was known about the prevalence of such practices either before or after the change in the law. We think it reasonable to assume that if the change in the law had produced any appreciable increase in homosexual behaviour or any large-scale proselytizing, these would have become apparent to the authorities.

Para. 60. We recognize that a proposal to change a law which has operated for many years so as to make legally permissible acts which were formerly unlawful, is open to criticisms which might not be made in relation to a proposal to omit, from a code of laws being formulated de novo, any provision making these acts illegal. To reverse a long-standing tradition is a serious matter and not to be suggested lightly. But the task entrusted to us, as we conceive it, is to state what we regard as just and equitable law. We therefore do not think it appropriate that consideration of this question should be unduly influenced by a regard for the present law, much of which derives from traditions whose origins are obscure.

Para. 61. Further, we feel bound to say this. We have outlined the arguments against a change in the law, and we recognize their weight. We believe, however, that they have been met by the counter-arguments we have already advanced. There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not

to condone or encourage private immorality. On the contrary, to emphasize the personal and private responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law.

Para. 62. We accordingly recommend that homosexual behaviour between consenting adults in private should no longer be a criminal offense.

APPENDIX B

CRIMINAL JUSTICE COSTS: PROSTITUTION ARRESTS, SAN FRANCISCO, 1967

Prepared by
William B. Smith

COST ANALYSIS

PROSTITUTICN ARRESTS AND PROCESSING:

I. Police Costs/Time:

Detention and arrests for female prostitution offenses are made by the Bureau of Special Services, the Patrol Division of the San Francisco Police Department and other special units of the Department, such as the Tactical Squad, and the "S Squad." In order to determine the amount of time required for detention and arrest on prostitution charges, an average time was formulated.

The detention and arrest process was considered to be that time between the period at which the officers' attention is first drawn to a particular individual and the time when the officer either completes a written police report as to the offenses of the individual, or he releases the individual if she has been detained.

From the point at which the officer's attention is drawn to a particular individual by her actions, behavior or dress, until the time the officer accosts the individuals, a minimum average time of 13 minutes elapses. From this point of original contact, until the time the officer places the responsible in physical custody, an average minimum time of 17 minutes elapses.

There is an additional waiting time for the police patrol vehicle to arrive at the arrest location or a transportation time by the arresting officers of the individual to some central holding or

booking facility. This average time is approximately 17 minutes. Further, there is an average of 5 minutes required to complete the police report.

The average time required to complete a detention exclusive of an arrest of an individual is 47 minutes.

The average time then, to affect an arrest of prostitution by the Patrol Division personnel is approximately 52 minutes.

During the period under question, there were 1,744 individuals detained by the Patrol Division and special squads of the San Francisco Police Department.

A. 1,744 detentions X 47 minutes X 2 patrolmen = 163,936 minutes or 2,732.2 hours.

B. 1,053 arrests X 5 minutes report writing = 5,265 minutes or 87.7 hours.

C. 2,732.2 detention hours + 87.7 additional arrest hours = 2,819.9 hours.

D. 2,819.9 hours X $5.35 per hr. ('67 patrolman's wage) = $15,086.46.

TOTAL $15,086.46

II. Transportation Costs:

Transportation to a district station or to the Hall of Justice for individuals who have been detained or arrested may be by either of two means. The defendant may be transported to a district station or the Hall of Justice by the arresting officer in a police vehicle, or by the police patrol wagon and the officers manning it.

If the individual has been transported by the officers who have made the arrest in a police car then the 17 minutes already considered in Paragraph I will suffice for transportation time. However, in approximately 70% of the cases, transportation was made by the police patrol wagon. In presenting figures on transportation we will be concerned not only with the individuals detained by the Patrol Division of the San Francisco Police Department, but also 372 individuals who were detained by the Bureau of Special Services. Total number of individuals detained was 2,116.

A. 2,116 detentions X 70% (average number transported by the patrol vehicle) = 1,481 transported individuals.

B. 1,481 transported individuals X 35 minutes X 2 patrolmen = 103,670 min. or 1,727.7 hours.

C. 1,727.7 hours X $5.35 per hr. ('67 patrolman's wage) = $9,243,19.

TOTAL $9,243.19

III. Personnel in the Bureau of Special Services Assigned to Prostitution:

A. Salary, Director of Bureau of Special Services (50% of the time)	$ 7,374.50
B. Salary, Sergeant of Police	$ 12,622.56
C. Salary, 12 patrolmen	$133,317.52
D. Salary, 1 Clerk typist (50% of time)	3,000.00
TOTAL	$156,811.58

IV. Booking Defendant/City Prison:

There is an average of 25 minutes spent from the time the defendant is brought to city prison to be booked, and the time she enters her cell.

A. 1,425 arrests X 25 minutes = 35,625 minutes or 593.7 hours.

B. 593.7 hours X $5.35 per hour = $3,176.29

TOTAL $3,176.29

V. Bail Receipts:

There is an average of 5 minutes expended for the preparation of each bail receipt issued by the clerk in the Criminal Records Division. Assuming that all 647b defendants were able to post bail, then;

A. 1,425 arrested X 5 minutes = 7,125 minutes or 118.7 hours.

B. 118.7 hours X $4.56 = $541.27

TOTAL $541.27

VI. Indexing Defendants:

Another clerk in the Criminal Records Division is responsible for indexing the defendant and her disposition in the courts criminal records index. There is an average of at least 5 indicies for an arrest, including continuances and each index requires approximately 2 minutes to record.

A. 1,355 charged X 2 minutes X 5 indicies = 13,550 minutes or 225.8 hours.

B. 225.8 hours X $4.10 per hour = $925.78

TOTAL $925.78

VII. Quarantine Time for Defendants:

Those arrested for 647b of the Penal Code are arrested normally between the hours of 10 p.m. and 2 a.m. They must remain quarantined until 3 p.m. in the afternoon following the arrest. Fourteen (14) hours then, is an average time spent by the defendants in city prison before being released on bail.

A. 1,425 arrested X 14 hours = 19,950 hours.

B. 19,950 hours X $0.48.5 cents per hours = $9,675.75

TOTAL $9,675.75

VIII. Venereal Disease Examination in the City Prison:

Each individual arrested on a charge of 647b receives an examination for venereal disease. The City Public Health Department provides 1 physician specialist and 1 registered nurse to conduct such an examination. The physician specialist spends an average of 9 hours per week conducting such examinations and the registered nurse spends an average of 14 hours per week assisting in such examinations and in the analysis of subsequent tests.

A. Physician: 9 hours a week X 52 weeks of the year = 468 hours

B. 468 hours X $8.68 per hour = $4,062.24

C. Nurse: 14 hours per week X 52 weeks = 728 hours

D. 728 hours X $4.19 per hour = $3,050.32

E. Additional medication costs: 1,425 defendants X $0.50 per medication unit = $712.50

TOTAL $7,825.06

IX. Preparation of the Court Calendar:

A. 1,355 charged defendants + 25 lines of the court calendar per page = 54.2 calendar pages.

B. 54.2 calendar pages X 5 average appearances = 271 calendar pages

C. 271 calendar pages X 15 minutes = 4.065 minutes or 67.7 hours

D. 67.7 hours X $4.10 per hour = $277.57

TOTAL $277.57

X. Court Time/Costs:

Costs of operation of the Municipal Court departments which handle violations of 647b of the Penal Code.

A. Salary, Municipal Court Judge = $ 11.97 hr.

B. Salary, Bailiff = $ 4.64 hr.

C. Salary, Courtroom Clerk = $ 5.89 hr.

D. Salary, Court Reporter = $ 6.95 hr.

E. Salary, District Attorney = $ 9.58 hr.

F. Salary, Probation Officer = $ 4.99 hr.

TOTAL $ 44.02 per hour

There is a minimum average of 5 appearances per arrest, including the initial appearances. Each appearance requires on the average of 4 minutes.

G. 4 minutes X 5 appearances X 1,355 defendants = 27,100 minutes or 451.6 hours

H. 451.6 hours X $44.02 per hour = $19,879.43

TOTAL $ 19,879.43

XI. Additional Court Costs/Court Trials:

There were a total of 76 court trials held before a judge. Each court trial required 31 minutes to complete.

A. 76 court trials X 31 minutes = 2,356 minutes or 30.9 hours

B. 30.9 hours per trial X $44.02 per court hour = $1,360.21

TOTAL $1,360.21

XII. Additional Costs/Jury Trials:

There were 55 jury trials for violation of 647b of the Penal Code during the period under inquiry. There is an average of three additional court appearances once the defendant is in the jury department. Each of these additional appearances require approximately 4 minutes each.

A. 3 appearances X 4 minutes X 55 trials = 660 minutes or 11 hours

B. 11 hours X $44.02 per hour = $484.22

Each of the 55 jury cases required an average of 6 hours, including jury selection.

C. 55 cases X 6 hours = 330 hours

D. 330 hours X $44.02 per hour = $14,526.60

E. $484.22 additional appearance costs + $14,526.60 additional court costs = $15,010.82

TOTAL $15,010.82

XIII. Jury Fees:

Each trial before a jury, required an average of 2 days to complete. The current rate for jurors during this period was $6.00 per day.

A. 2 days X $6.00 per juror per day X 12 jurors = $144 per trial

B. $144 per trial X 55 trials = $7,920.00

Although only 12 jurors were chosen for each trial, a total of 40 prospective jurors were summoned. Of the 40 jurors summoned approximately 30 would appear. Jury is normally seated in 1 day on prostitution cases.

As only 12 jurors are selected for the trial this leaves a total of 18 rejected jurors who nevertheless receive $6.00 per trial each.

C. 18 jurors rejected X $6.00 per day = $108.00

D. $108 X 55 trials = $5,940.00

E. $7,920.00 trial costs + $5,940.00 additional jury costs = $14,860.00

TOTAL $14,860.00

XIV. Public Defender Costs for Prostitution Cases:

The Public Defenders Office represented 1,007 defendants charged with violation of 647b of the Penal Code during this period. An average of 4 appearances were made in behalf of each of the defendants. Each appearance required 4 minutes, which excludes trial time in behalf of these defendants. Additionally the Public Defender expended 6,206 minutes in court and jury trial defense time.

A. 1,007 defendants X 4 appearances = 4,028 appearances

B. 4,028 appearances X 4 minutes = 16,112 minutes

C. 16,112 minutes + 6,206 minutes trial time = 22,318 min. or 371.8 hours

D. 371.8 hours X $7.91 per hour = $2,940.93

TOTAL $2,940.93

XV. Police Overtime for Court Appearances:

There are no figures available to us to indicate how much overtime was expended by the police department for court appearances in prostitution cases. We can only surmise the following.

Approximately 45% or 621 cases of those charged with prostitution in San Francisco were dismissed on the motion of the District Attorney. Therefore, one may assume that the decisions for dismissal were made prior to a court trial. In these 621 cases then it would be reasonable to expect that police officers would not be present. This leaves a remainder of approximately 734 cases in which there is a probability that police officers were subpoenaed as witnesses.

The average number of appearances by an officer would be approximately one (1). For each appearance the officer would receive 2 hours of compensation.

A. 1 appearance X 2 hours X 734 cases = 1,468 hours

B. 1,468 hours X $5.35 per hour X 2 police officers = $15,557.60

Further, as there were 55 jury trials the following additional expenses would be incurred.

C. 55 jury trials X 1 appearance X 2 officers = 110 appearances

D. 110 appearances X 2 hours overtime X $5.35 = $1,117.00

TOTAL $16,734.60

XVI. Total Costs for Criminal Justice Processing: Arrest Through Sentence:

TOTAL $272,348.94

XVII. County Jail Costs:

The Sheriff's Department has reported that the average daily cost of maintaining a prisoner in a county jail during this period was $4.29 per day. There were 389 county jail sentences handed down during this period of time on charges of prostitution. The average length of the sentence handed down was 64 days.

A. 389 sentences X 64 days = 24,896 days

B. 24,896 days X $4.29 per day = $106,803.84

TOTAL $106,803.84

XVIII. Total Criminal Justice Costs:

TOTAL $379,153.00

APPENDIX C

BASIC CALIFORNIA OBSCENITY STATUTES

ALL SECTIONS REFER TO CALIFORNIA

PENAL CODE

Sec. 311. (Indecent exposures, exhibitions, etc.: Grade of Offense: Application of subd 6.)

As used in this chapter:

(a) " Obscene matter means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or exeretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters;

and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

(g) "Obscene live conduct" means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting,

simulating, or pantomiming, where, taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the conduct is judged with reference to average adults unless it appears from the nature of the conduct or the circumstances of its production, presentation or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the conduct shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the conduct and can justify the conclusion that the conduct is utterly without redeeming social importance.

Sec. 311.2. (Sale or distribution, etc., of obscene matter: Penalty: Motion picture machine operator.)

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

Sec. 311.4. (Hiring, employing, etc., minor to engage in acts described in Sec. 311.2: Penalty.) Every person who, with knowledge that a person is a minor, or who, while in possession of such facts that he should reasonably know that such person is a minor, hires, employs, or uses such minor to do or assist in doing any of the acts described in Section 311.2, is guilty of a misdemeanor.

Sec. 311.5. (Advertisement, promotion of sale, etc., of matter represented to be obscene: Penalty.)

Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material, or who in any manner promotes, the sale, distribution, or exhibition of matter represented or held out by him to be obscene, is guilty of a misdemeanor.

Sec. 311.6. (Participating in, etc. obscene live conduct: Penalty.) Every person who knowingly engages or participates in, manages, produces, sponsors, presents or exhibits obscene live conduct to or before an assembly or audience consisting of at least one person or spectator in any public place or in any place exposed to public view, or in any place open to the public or to a segment thereof, whether or not an admission fee is charged, or whether or not attendance is conditioned upon the presentation of a membership card or other taken, is guilty of a misdemeanor.

Sec. 311.7. (Requiring purchaser or consignee to receive obscene matter as condition to sale, etc.: Penalty.) Every person who, knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, requires that the purchaser or consignee receive any obscene matter or who denies or threatens to deny a franchise, revokes or threatens to revoke, or imposes any penalty, financial or otherwise, by reason of the failure of any person to accept obscene matter, or by reason of the return of such obscene matter, is guilty of a misdemeanor.

Sec. 311.8. (Defense.) It shall be a defense in any prosecution for a violation of this chapter that the act charged was committed in aid of legitimate scientific or educational purposes.

Sec. 311.9. (Punishment for violation of Secs. 311.2, 311.3, 311.4, 311.7, 313.1.)

(a) Every person who violates Section 311.2 or 311.5 is punishable by fine of not more than one thousand dollars ($1,000) plus five dollars ($5) for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed ten thousand dollars ($10,000), or by imprisonment in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both such fine and imprisonment. If such person has previously been convicted of any offense in this chapter, or of a violation of Section 313.1, a violation of Section 311 2 or 311.5 is punishable as a felony.

(b) Every person who violates Section 311.4 is punishable by fine of not more than two thousand dollars ($2,000) or by imprisonment in the county jail for not more than one year, or by both such fine and such imprisonment. If such person has been previously convicted of a violation of former Section 311.3 or 311.4, he is punishable by imprisonment in the state prison not exceeding five years.

(c) Every person who violates Section 311.7 is punishable by fine of not more than one thousand dollars ($1,000) or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment. For a second and subsequent offense he shall be punished by a fine of not more than two thousand dollars ($2,000), or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. If such person has been twice convicted of a violation of this chapter, a violation of Section 311.7 is punishable as a felony.

Sec. 312.1 (Evidence in prosecution: Nonrequirement as to expert testimony concerning obscene or harmful character: Admissibility of evidence tending to establish contemporary community standards.)

In any prosecution for a violation of the provisions of this chapter or of Chapter 7.6 (commencing with Section 313), neither the prosecution nor the defense shall be required to introduce expert witness testimony concerning the obscene or harmful character of the matter or live conduct which is the subject of any such prosecution. Any evidence which tends to establish contemporary community standards of appeal to prurient interest or of customary limits of candor in the description or representation of nudity, sex or excretion, or which bears upon the question of redeeming social importance, shall, subject to the provisions of the Evidence Code, be admissible when offered by either the prosecution or by the defense.

Sec. 313. (Definitions) As used in this chapter:

(a) "Harmful matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is prurient interst, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance for minors.

(1) When it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition that it is designed for clearly defined deviant sexual groups, the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In the prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance for minors.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription, or mechanical, chemical, or electrical reproduction or any other articles, equipment, machines, or materials.

(c) "Persons" means any individual, partnership, firm, association, corporation, or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter.

(f) "Exhibit" means to show.

(g) "Minor" means any natural person under 18 years of age.

Sec. 313.1 (Distribution or exhibition of harmful matter to minor as misdemeanor.)

(a) Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit any harmful matter to the minor is guilty of a misdemeanor.

(b) Every person who misrepresents himself to be the parent or guardian of a minor and thereby causes the minor to be admitted to an exhibition of any harmful matter is guilty of a misdemeanor.

Sec. 313.2 (Absence of prohibition against parent's distribution to his child.)

(a) Nothing is this chapter shall prohibit any parent or guardian from distributing any harmful matter to his child or ward or permitting his child or ward to attend an exhibition of any harmful matter if the child or ward is accompanied by him.

(b) Nothing in this chapter shall prohibit any person from exhibiting any harmful matter to any of the following:

(1) A minor who is accompanied by his parent or guardian.

(2) A minor who is accompanied by an adult who represents himself to be the parent or guardian of the minor and whom the person, by the exercise or reasonable care, does not have reason to know is not the parent or guardian of the minor.

Sec. 313.3 (Scientific or educational purposes as defense.)

It shall be a defense in any prosecution for a violation of this chapter that the act charged was committed in aid of legitimate scientific or educational purposes.

Sec. 313.4 (Punishment.)

Every person who violates Section 313.1 is punishable by fine of not more than two thousand dollars ($2,000) or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. If such person has been previously convicted of a violation of Section 313.1 or any section of Chapter 7.5 (commencing with Section 311) of Title 9 of Part 1 of this code, he is punishable by imprisonment in the state prison for not exceeding five years.

Sec. 313.5 (Statutory severability and partial validity.)

If any phrase, clause, sentence, section or provision of this chapter or application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other phrase, clause, sentence, section, provision or application of this chapter, which can be given effect without the invalid phrase, clause, sentence, section, provision or application and to this end the provisions of this chapter are declared to be severable.

END